SUPREME COURT OF THE UNITED STATES.

No. 210.

THE WINONA AND SAINT PETER RAILROAD COMPANY, PLAIFTIFF IN ERROR,

vs.

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. CROUCH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

TRANSCRIPT OF RECORD FILED OCTOBER 6, 1873.

CERTIORARI AND RETURN FILED OCTOBER 30, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 210.

THE WINONA AND SAINT PETER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. CROUCH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ	3	1
Citation and service	5	2
Bond	6	2
Notice	9	3
Bond	10	3
Summons	14	5
Complaint	16	5
Answer	19	6
Affidavit in replevin	23	8
Bond in replevin	25	9
Bond in replevin	29	10
Findings	33	11
Judgment	42	14
Clerk's certificate	43	15
Proceedings in supreme court	45	15
Order for judgment	46	16
Judgment	47	16
Clerk's certificate	49	17
Certiorari and return	50	18
Petition for writ of error	53	18
Allowance	55	19
Opinion	57	20
Clerk's certificate	75	25

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the supreme court of the State of Minnesota, greeting:

Because in the record and proceedings, and also in the rendition of the judgment in a plea, which is in the said supreme court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit, between John D. Blake, Alfred D. Leet, and Stephen V. Crouch, plaintiffs, and the Winona and Saint Peter Railroad Company, defendant, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity, a manifest error hath happened to the great damage of the said defendant, as by its complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seals distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second

2 Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, the 26th day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninty-eighth year.

[SEAL.]

H. E. MANN,
Clerk U. S Circuit Court, District of Minnesota.

3 STATE OF MINNESOTA,
Supreme Court, ss:

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States.

Answer of the justices of the supreme court of the State of Minnesota, as commanded in the within writ.

Dated St. Paul, Minnesota, this 8th day of September, A. D. 1873.

[SEAL.]

SHERWOOD HOUGH,
Clerk Supreme Court Minnesota.

4 (Indorsed:) United States of America. Supreme Court. 1552. John D. Blake et. al. vs. the Winona & St. Peter R. R. Co. Writ of error. Filed July 28th, 1873. Sherwood Hough, clerk. W'm Mitchell, atty. for deft.

Due service of the within writ of error at St. Paul, Minnesota, on July 28, 1873, is hereby admitted.

SHERWOOD HOUGH,
Clerk Sup. Ct. Minn.

5 UNITED STATES OF AMERICA,
State of Minnesota, ss :

By the honorable C. G. Ripley, chief justice of the supreme court of the State of Minnesota. To John D. Blake, Alfred D. Leet and Stephen D. Crouch, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second (2nd) Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein the Winona and St. Peter Railroad Company is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the honorable C. G. Ripley, chief justice of the said supreme court of the State of Minnesota, on this 28th day of July, in the year of our Lord, one thousand eight hundred and seventy-three.

C. G RIPLEY,
Chief Justice of Supreme Court of the State of Minnesota.

6 (Endorsed as follows :)

Due service of within citation, at St. Paul, Minnesota, on this July 28th, 1873, is hereby admitted.

W. P. CLOUGH,
Attorney of Defendants in Error.

Filed July 28th, 1873, Sherwood Hough, clerk.

Supreme Court of the United States.

THE WINONA & ST. PETER RAILROAD Company, plaintiff in error,
agst.
JOHN D. BLAKE, ALFRED D. LEET AND Stephen V. Crouch, defendants in error.

Know all men by these presents, that we, the Winona & St. Peter Railroad Company, as principal, and Henry W. Lamberton, as surety, are held and firmly bound unto John D. Blake, Alfred D. Leet, and Stephen V. Crouch, in the sum of one thousand dollars, to be paid to the said John D. Blake, Alfred D. Leet and Stephen V. Crouch, their executors, or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and
7 each of our successors, heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this 25th day of July, A. D. 1873.

Whereas the above bounden The Winona and Saint Peter Railroad Company has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above named The Winona and Saint Peter Railroad Company shall prosecute its said writ of error to effect, and answer all costs if it shall

fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE WINONA & ST. PETER RAILROAD COMPANY, [SEAL.]
H. V. LAMBERTON. [SEAL.]

I hereby approve the above bond and the sureties therein.

C. G. RIPLEY,
Chief Justice Sup. C't, State of Minnesota.

8 (Endorsed as follows:) Filed July 28, 1873, Sherwood Hough.

9 To the supreme court of the State of Minnesota:

An appeal having been taken from a judgment rendered by the district court in and for Olmsted County in an action wherein J. D. Blake et al., are plaintiffs, and the Winona and St. Peter Railroad Company is defendant, I, C. T. Benedict, clerk of said district court in and for said Olmsted County do make return on said appeal as follows:

State of Minnesota, in district court, county of Olmsted.

JOHN D. BLAKE, ALFRED D. LEET, AND Stephen V. Crouch, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD Company, defendant.

SIR: Please to take notice that the above-named plaintiffs appeal to the supreme court in and for said State, from the judgment ren-
10 dered by said district court in the above-entitled action, on the 17th day of May, A. D. 1872, against said plaintiffs therein.

Dated May 18th, 1872.

Yours respectfully,

W. P. CLOUGH,
Att'y for Pl'ffs.

TO C. T. BENEDICT, Esq., *Clerk of said District Court*, and MITCHELL and YALE, Esq's., *Attorneys for said Defendant.*

Due service of the within notice is hereby admitted at Winona, Minnesota, on this 20th day of May, A. D. 1872.

MITCHELL AND YALE,
Attorneys for Def't.

Due service of within notice admitted at Rochester, Minnesota, this 22d day of May, A. D. 1872.

C. T. BENEDICT,
Clerk District Court.

Bond on appeal.

In district court.

STATE OF MINNESOTA,
County of Olmsted, ss:

JOHN D. BLAKE, ALFRED D. LEET, AND Stephen V. Crouch, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD Company, defendant.

11 Know all men by these presents, that we, John D. Blake, for himself and the other plaintiffs above named, as principal, and

Andrew Nelson, and Cyrus H. Kellogg as sureties, are held and firmly bound unto the Winona and St. Peter Railroad Company, above named, in the sum of two hundred and fifty dollars, to be paid to the said Winona and St. Peter Railroad Company, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 18th day of May, A. D. 1872.

The condition of this obligation is such that, whereas the said plaintiffs appeal to the supreme court for said State from that certain judgment rendered by said district court in the above-entitled action in favor of said defendant and against said plaintiffs on the 17th day of May, A. D. 1872:

Now, therefore, if the said appellants, the plaintiffs above named, will pay all costs and charges which may be awarded against them on such appeal, then this obligation shall be null and void; otherwise of force and effect.

12 In testimony whereof we have hereunto set our hands and seals the day and year aforesaid.

JOHN D. BLAKE. [SEAL.]
A. NELSON. [SEAL.]
C. H. KELLOGG. [SEAL.]

Signed, sealed, and delivered in the presence of:
W. P. CLOUGH.
T. SEEMANN.

STATE OF MINNESOTA,
County of Olmsted, ss:

Be it known that, on this 18th day of May, A. D. 1872, came before me, personally, John D. Blake, Andrew Nelson, and Cyrus H. Kellogg, to me well known to be the same persons who executed the foregoing bond, and they severally acknowledged the same to be their own free act and deed.

[NOTARIAL SEAL.] W. P. CLOUGH,
Notary Public.

13 STATE OF MINNESOTA,
County of Olmsted, ss:

Andrew Nelson and Cyrus H. Kellogg came before me personally, and, being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident and freeholder of and in this State of Minnesota, and resides in the city of Rochester, in said State, and worth the amount of five hundred dollars above his debts and liabilities, and exclusive of his property which is exempt from execution.

C. H. KELLOGG.
A. NELSON.

Subscribed and sworn to before me on this 18th day of May, A. D. 1872.

[NOTARIAL SEAL.] W. P. CLOUGH,
Notary Public.

Due service of a copy of within bond admitted this 20th day of May, 1872.

MITCHELL & YALE,
Attorneys for Defendant.

14 *Summons.*

District court, third judicial district.

STATE OF MINNESOTA,
County of Olmsted, ss:

JOHN D. BLAKE, ALFRED D. LEET, AND STEphen V. Crouch, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD Company, defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiffs in the above-entitled action, which is filed in the office of the clerk of said court, at the city of Rochester, in said county, and to serve a copy of your answer to said complaint on the subscriber at his office in the city of Rochester, in said county, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time
15 aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated Rochester, Minnesota, June 16th, 1871.

W. P. CLOUGH,
Plaintiffs' Attorney.

STATE OF MINNESOTA,
County of Olmsted, ss.:

I do hereby certify, that on the 16th day of June, 1871, at the city of Rochester, in said county, I served the within summons on the within defendant, which service was made by delivering to and leaving with John C. Hamilton, agent for the said defendant, a true copy thereof.

W'M BROWN,
Sheriff of said County.

Fees: Mileage, 20; service $1.00—$1.20.

District court, third judicial district.

STATE OF MINNESOTA,
County of Olmsted, ss:

JOHN D. BLAKE, ALFRED D. LEET, & STEphen V. Crouch, plaintiffs,
against.
THE WINONA & ST. PETER RAILROAD Company, defendant.

16 The plaintiffs complaining of the defendant, allege that they are, and during all the time hereinafter mentioned have been, partners under the firm-name of J. D. Blake and Co.; that the defendant is, and during all the times hereinafter mentioned has been, a corporation organized under the laws of this State, and during all the times hereinafter mentioned, has owned and carried on a railroad within this State, run-

ning from Winona to Rochester, in this State, and thence westward; that the plaintiffs as partners as aforesaid are, and during all the times hereinafter mentioned have been, the owners and entitled to the immediate possession of all that certain personal property described as follows, to wit, two bales of cotton cloth.

That hereafter, to wit, on or about the first day of June, 1871, the defendant came into the posession of said property, and transported the same over its said railroad within this State, from Winona to Rochester aforesaid; that the distance from said Winona to said Rochester, upon and by way of said railroad, is fifty miles and no more; that the weight of said property at the time of such transportation by the defend-
17 ant, was two hundred and eighty pounds and no more; that said property at the time of such transportation by the defendant, was dry goods and merchandize usually carried upon railroads at rates denominated first class; that the value of such transportation was no greater than forty-two cents; that at the time of the taking of such property into its possession the defendant advanced and prepaid charges upon the same to the amount of two dollars and twenty-four cents; that after said goods were so transported by the defendant, and before the time of the commencement of this action, the plaintiffs duly offered to pay, and tendered to the defendant for such transportation, at said Rochester, freight at and after the rate of four dollars and five cents per ton, being the sum of fifty-seven cents, and the further sum of two dollars and twenty-four cents, being in all the sum of two dollars and eighty-one cents, and demanded the delivery of said property to the plaintiffs, but the defendant refused to deliver said property to the plaintiffs, or any part thereof, and has ever since wrongfully detained the same,
18 and the possession thereof from these plaintiffs at said county; that said property was marked and consigned to the plaintiffs under and by their said firm-name at Rochester, aforesaid; that the same was transported by the defendant as aforesaid without the instance or request of the plaintiffs; that the value of said property is one hundred and five dollars; that by reason of the wrongful detention of said property by the defendant, as hereinbefore stated, the plaintiffs have sustained damage in the sum of fifty dollars, and that the plaintiffs now bring into court the said sum of two dollars and eighty-one cents, tendered and offered to the defendant by the plaintiffs as hereinbefore stated, ready to be paid to the defendant if it will accept the same.

Wherefore the plaintiffs demand judgment against the defendant for the recovery of the possession of said property, or for the sum of one hundred and five dollars, the value thereof in case a recovery thereof cannot be had, together with fifty dollars damages for the detention thereof, and for the costs and disbursements of this action.

W. P. CLOUGH,
Attorney for Plaintiffs.

19 *Answer.*

District court, third judicial district, county of Olmsted.

JOHN D. BLAKE, ALFRED D. LEET, AND STEphen V. Crouch, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD COMpany, defendant.

The defendant for answer to the complaint of the plaintiff herein, de-

nies each and every allegation of said complaint, not hereinafter specifically admitted.

Defendant admits and alleges that it is, and during all the time in said complaint mentioned has been, a corporation organized and doing business within the State of Minnesota, under and by virtue of an act of the legislature of the late Territory of Minnesota, passed March 3d, 1855, and entitled, "A bill to incorporate the Transit Railroad Company," and an act of the legislature of the State of Minnesota, passed March 10th, 1862, entitled, "An act to facilitate the construction of a railroad from Winona westerly by way of St. Peter."

20 The defendant also admits that during the time mentioned in the complaint, they owned and operated a railway within this State, and between Winona and Rochester.

The defendant, further answering, alleges that, on or about the first day of June, A. D. 1871, the personal property described in the complaint, being then in course of transit from Chicago to Rochester, consigned to the plaintiffs at the latter point, was, in accordance with the usual course and custom of business among carriers, and which was well known to the plaintiffs, delivered by the last preceding line of carriers between Chicago and Rochester, to the defendant at Winona, to be by it carried over and upon its railroad from said Winona to Rochester; that the defendant received said personal property at Winona for the purpose of such transportation, and no other, and then and there paid and advanced to the said preceeding carrier, advanced charges thereon to the amount of $2.24.

The defendant further alleges, that thereafter, and at the instance and request of plaintiffs, they transported said personal property over

21 their said road from Winona to Rochester, a distance of fifty miles; that said transportation of said property from Winona to Rochester was reasonably worth the sum of one dollar, to wit, at the rate of thirty-six cents per hundred pounds; that the usual and established and published rates of freight upon goods, wares, and merchandize of the kind described in the complaint for the said distance, upon defendant's road, as well as upon other roads in the State of Minnesota and elsewhere, at and prior to the date of the shipping and transportation of the property in question, was and is thirty-six cents per hundred pounds, which said rate of charges was well known to plaintiffs at the time they shipped said goods, and at the time they were received by defendant for transportation, and that plaintiffs shipped said goods and delivered them to defendant for transportation, and the defendant received and transported said goods with reference to the aforesaid well established rate; and the plaintiffs promised to pay defendant for transporting said goods from Winona to Rochester at the rate of thirty-six cents per hundred pounds, to wit, in the aggregate the sum of $1.00, besides said sum of $2.24 advanced charges.

22 That by reason of the premises, the defendant as a common carrier had, upon the arrival of said goods at Rochester, a lien thereon for the sum of $3.24 for their own services, and for said advanced charges; that defendant immediately notified plaintiffs of the arrival of said property, and of their readiness to deliver the same to them on payment of said sum; that the defendant has always been and is now ready and willing to deliver said property to plaintiffs on payment of said sum of $3.24 charges thereon, but the plaintiffs have always refused and still refuse to pay the same; that by reason of the premises, defendant submits that by reason of this aforesaid lien they have a special property in said goods and have a right to retain possession thereof until their said charges in the sum of $3.24 be paid or tendered.

Wherefore defendant asks judgment awarding to them the possession of said personal property, and for such other relief as may be just.

MITCHELL & YALE,
Defendant's Attorneys.

23 *Affidavit in replevin.*

District court, third judicial district.

STATE OF MINNESOTA.
County of Olmsted, ss:

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. Crouch, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, defendant.

STATE OF MINNESOTA,
County of Olmsted, ss:

John D. Blake came before me personally, and, being first duly sworn, doth say that he is one of the said plaintiffs in the above-entitled cause; that said plaintiffs are the owners and lawfully entitled to the immediate possession of that certain personal property, to recover possession of which this suit is brought, and which is described as follows, that is to say:

Two bales of cotton cloth.

That the same is wrongfully detained from said plaintiffs by
24 defendant, at the county of Olmsted and State aforesaid; that the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of said plaintiffs; and that the actual value of the aforesaid property is one hundred and five dollars.

And further saith not.

J. D. BLAKE.

Subscribed and sworn to before me on this 16th day of June, 1871.
[NOTARIAL SEAL.] T. SEEMANN,
Notary Public.

You are hereby required to take the property described in the within affidavit from the within-named defendant, and the same deliver to the plaintiff.

Dated June 16th, 1871.

W. P. CLOUGH,
Plaintiff's Attorney.

STATE OF MINNESOTA,
County of Olmsted, ss:

To the sheriff of the county of Olmsted, Minnesota:

25 I do hereby certify that, by virtue of the within affidavit in replevin, I took the property mentioned therein, and, on the 19th day of June, 1871, delivered the same to J. D. Blake.

W'M BROWN,
Sheriff of said County.

Bond in replevin.

District court, third judicial district.

STATE OF MINNESOTA,
County of Olmsted:

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. Crouch, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, defendant.

Know all men by these presents that we, John D. Blake, in behalf of himself and the other plaintiffs above named, plaintiff, as principal, and Cyrus H. Kellogg and Andrew Nelson, as sureties, are held and firmly bound unto the Winona and St. Peter Railroad Company, defend-
26 ant in the above-entitled action, in the sum of two hundred and ten dollars, lawful money of the United States, to be paid unto the said Winona and St. Peter Railroad Company, its successors or assigns; for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this sixteenth day of June, A. D. 1871.

The condition of this obligation is such that, whereas an affidavit has been duly made in this action that the said defendant wrongfully detains from said plaintiffs certain personal property therein described, of the value of one hundred and five dollars, and said plaintiffs claim the immediate delivery of such property to them, according to the statute in such case provided:

Now, therefore, if the said plaintiffs shall prosecute said action with effect and return said property to said defendant if a return is adjudged, and shall pay to it such sum as for any cause may be recovered against the plaintiffs, then this obligation shall be void; otherwise of force.
27 In testimony whereof we have hereunto set our hands and seals on this sixteenth day of June, A. D. 1871.

J. D. BLAKE. [SEAL.]
C. H. KELLOGG. [SEAL.]
A. NELSON. [SEAL.]

Signed, sealed, and delivered in presence of—
T. SEEMANN.
W. P. CLOUGH.

STATE OF MINNESOTA,
County of Olmsted, ss:

Be it known, that on this sixteenth day of June, A. D. 1871, came before me personally, John D. Blake, Cyrus H. Kellogg, and Andrew Nelson, to me well known to be the same persons who executed the foregoing bond, and each severally acknowledge the same to be his own free act and deed.

[NOTARIAL SEAL.] T. SEEMANN,
Notary Public.

STATE OF MINNESOTA,
County of Olmsted, ss:

Cyrus H. Kellogg and Andrew Nelson, upon oath doth say,
28 each for himself, that he is one of the sureties above-named; that

he is a resident and freeholder of and in the State of Minnesota, and worth the amount of two hundred and ten dollars, specified in the foregoing bond, above his debts and liabilities, and exclusive of his property which is exempt from execution.

CYRUS H. KELLOGG.
A. NELSON.

Subscribed and sworn to before me, on this 16th day of June, A. D. 1871.

[NOTARIAL SEAL.] T. SEEMANN,
Notary Public.

I hereby approve the within bond and the sureties therein.
Dated June 16th, 1871.

WM BROWN,
Sheriff of Olmsted County, Minnesota.

29 *Bond in replevin when defendant desires a return of the property.*

District court, third judicial district.

STATE OF MINNESOTA,
County of Olmsted:

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. Crouch, plaintiffs,
against
THE WINONA & ST. PETER RAILROAD COMPANY, defendants.

Know all men by these presents, that we, James H. Stewart, superintendent of the Winona & St. Peter Railroad, as principal, and H. W. Lamberton and A. F. Hodgins, as sureties, are held and firmly bound unto John D. Blake, Alfred D. Leet, and Stephen V. Crouch, plaintiffs in the above entitled action, in the sum of two hundred and ten dollars, lawful money of the United States, to be paid unto the said John D. Blake, Alfred B. Leet, and Stephen V. Crouch, their heirs, executors, administrators, or assigns, for which payment well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and ad-
30 ministrators, firmly by these presents, sealed with our seals, and dated this 17th day of June, A. D. 1871.

The condition of this obligation is such that, whereas a writ of replevin has been issued in this action, and certain personal property therein described, and alleged to be of the value of one hundred and five dollars, seized by virtue of said writ, and said defendant desires a return of such property to them, according to the statute in such case provided:

Now, therefore, if said property shall be delivered to said plaintiffs, if a delivery is adjudged, and said plaintiff paid such sum as for any cause may be recovered against the defendant, then this obligation shall be void, otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 17th day of June, A. D. 1871.

J. H. STEWART. [SEAL.]
Superintendent of the Winona & St Peter Railroad.
H. W. LAMBERTON. [SEAL.]
A. F. HODGINS. [SEAL.]

Signed, sealed, and delivered in the presence of—
WILLIAM H. YALE.
A. J. MEAD.

31 STATE OF MINNESOTA,
County of Winona, ss:

Be it known that, on this 17th day of June, A. D. 1871, came before me, personally, James H. Stewart, superintendent of the Winona and St. Peter Railroad, H. W. Lamberton, and A. F. Hodges, to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] WILLIAM H. YALE,
Notary Public.

STATE OF MINNESOTA,
County of Winona, ss:

H. W. Lamberton and A. T. Hodgins, upon oath, doth say, each for himself, that he is one of the sureties above-named; that he is a resident and freeholder of and in the State of Minnesota, and worth the amount of two hundred and ten dollars, specified in the foregoing bond, above his debts and liabilities, and exclusive of his property, which is exempt from execution.

H. W. LAMBERTON.
A. F. HODGINS.

32 Subscribed and sworn to, before me, on this 17th day of June, A. D. 1871.

[NOTARIAL SEAL.] WILLIAM H. YALE,
Notary Public.

The defendant hereby requires a return of the property seized on the writ issued in the above-entitled action.

Dated June 17th, 1871.

To the sheriff of Olmsted County, Minn.

District court, Olmsted County.

JOHN D. BLAKE, STEPHEN V. CROUCH, AND Alfred D. Leet, plaintiffs,
against
THE WINONA & ST. PETER RAILROAD COMPANY, defendant.

The above-entitled action being regularly upon the calender, and brought to trial at the last term of this court, in and for said county, before the court without a jury, a jury trial having been duly waived, after hearing the evidence and allegations of the respective par-
33 ties, and the arguments of their counsel, to wit, W. P. Clough, esq., for the plaintiffs, and William Mitchell, esq., for the defendant, I find the facts in the case as follows, viz:

I. That the plaintiffs are, and during all the times in the complaint alleged were, partners, under the firm-name of J. D. Blake & Co.

II. That the defendant, during all the time in the complaint alleged was, and still is, a railroad corporation, organized under the laws of the Territory and State of Minnesota, and, as such, owned and operated a railroad within this State, running from Winona to Rochester, in this State, and thence westward, over and upon which it was, during all the times aforesaid, engaged in transporting, for hire, the persons and property, of all who employed them. The right of way for defendant's said road, and the lands upon which the same is constructed, were ob-

tained by defendant by adverse proceedings under the provisions of section five of the act of the legislature of the Territory of Minnesota, entitled "A bill to incorporate the Transit Railroad Company,"
34 approved March 3d, 1855, and of the various acts of the legislature of the said Territory, and of the State of Minnesota, amendatory thereof.

III. That the following are the divers acts of the legislative assembly of the Territory of Minnesota, the legislature of the State of Minnesota, and the Congress of the United States, under and pursuant to which the said railroad company was organized, and has operated and transacted its business, and by which it is governed or affected:

(*a.*) "A bill to incorporate the Transit Railroad Company," already mentioned.

(*b.*) "An act of Congress making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March 3d, 1857.

(*c.*) "An act of Congress extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March 3d, 1865.

35 (*d.*) "An act of Congress relating to lands granted to the State of Minnesota, to aid in constructing railroads," approved July 13th, 1866.

(*e.*) The act of the territorial legislative assembly, accepting the provisions of the act of Congress, and assuming the execution of its trust of May 19th, 1857.

(*f.*) An act by the Minnesota legislature, to execute the trust created by act of Congress, and granting lands to Transit Railroad Company, approved May 22d 1857.

(*g.*) Amendment to section ten, article nine of the constitution, adopted April 15th 1858. h. An act concerning land grant railroads, approved August 12th, 1858.

(*h.*) An act in addition to an act entitled an act concerning land-grant railroads, passed August 25th, 1858, approved March 6th, 1860.

(*i.*) "An act to facilitate the construction of a railroad from Winona, westerly, by the way of St. Peter," approved March 10th, 1862.

(*j.*) "An act to amend the last act," approved February 28th, 1866.

(*k.*) "An act to extend the time of completion of the Winona & St. Peter Railroad," approved March 4th, 1869.

(*l.*) Another act granting extension of time, approved March 3d, 1871.

36 IV. That the plaintiffs as partners as aforesaid are, and at all the times named in the complaint were, the general owners of the property in the complaint described, to wit, two bales of cotton cloth, which were of the value of one hundred and five dollars.

V. That on the first day of June, 1871, the aforesaid personal property was shipped by the plaintiffs from Chicago, Illinois, by railroad, consigned to themselves at Rochester, Minnesota, for the purposes of transportation from Chicago to Rochester aforesaid.

VI. That, a few days after its shipment as aforesaid, said property, while in the usual course of transit from Chicago to Rochester, was delivered to defendant at Winona, in this State, by the last preceeding carrier, to be by it transported over its road from said Winona to Rochester; that there was never any express contract between plaintiffs and defendant for the transportation of the goods over defendant's said road;

that upon such receipt thereof the defendant paid and advanced thereon the sum of two dollars and twenty-four cents back charges on
37 said property; that thereupon defendant transported the same over its said railroad within this State, from Winona to Rochester aforesaid, a distance upon and by said railroad of fifty miles, and no more.

VII. That the weight of said property at the time of said transportation by defendant, was two hundred and eighty pounds and no more, and at the time of said transportation was goods, wares, and merchandize usually carried upon railroads as those denominated "first class."

That, after the said goods were transported by defendant to Rochester, and before the commencement of this action, the plaintiffs duly tendered to defendant and offered to pay the defendant for such transportation at said Rochester, freight at and after the rate of four dollars and five cents per ton, to wit, the sum of fifty-seven cents, and the further sum of two dollars and twenty-four cents, the advanced charges paid by defendant as aforesaid, making in all two dollars and eighty-one cents so tendered, and demanded the delivery of said property to the plaintiffs, which the defendant then and there refused, and retained the
38 property until the same was taken by plaintiffs from defendant, by authority of proceedings in this action.

VIII. That defendant, however, offered to deliver said property to the plaintiffs upon its arrival at Rochester, and has always since been both ready and willing to deliver said property to the plaintiffs upon payment to the defendant of said sum of two dollars and twenty-four cents, the back charges thereon advanced by them as aforesaid, and the further sum of one dollar for their services in transporting said goods from Winona to Rochester as aforesaid, making in all the sum of three dollars and twenty-four cents.

That said sum of one dollar claimed by defendant for their said services was, in accordance with the rates of freight upon property of that kind, established by the regular published tariff bills of defendant, and was the same rate and no greater than that usually charged by defendant for like services; that plaintiffs refused to pay the said sum one dollar, or any other or greater sum than the advanced charges and fifty-seven cents for the transportation of the goods from Winona to Rochester.

39 IX. That it is a fact, and was so stipulated and agreed by the parties, for the purposes of this action, that the tender above stated was sufficient in law to entitle the plaintiffs to the possession of said property, provided the provisions of the act of the legislature of Minnesota, entitled "An act to regulate the carrying of freight and passengers on all railroads in this State," passed March 6th, 1871, are valid and binding upon and applicable to the defendant in this case—the tender being of a sufficient amount according to the rates established by that act.

X. That it was further stipulated and agreed between the parties, in and for all the purposes of this action, that if the court should be of opinion that the said provisions of said act of March 6th, 1871, are valid, operative, and applicable as to the defendant in this case, that then and in such case judgment shall be for the plaintiffs; otherwise for the defendant

And from the foregoing facts, I do decide and find the following conclusions of law, viz:

40 I. That, under and by virtue of the defendant's act of incorporation, and the several other acts pertaining to the subject-matter accepted and acted upon by the defendant, it, prior to the passage of the

act of 1871, possessed the implied right to transport passengers and freight on and over its road, and make and receive some charges for such service.

II. That this right, though one arising by necessary implication only, is one of the essential franchises of the corporation which became vested in the company upon its acceptance of its charter, and immediately became as sacred as any other of its rights.

III. That, in the absence of any provision in the charter, or other acts accepted by the defendant, fixing the amount of the charges for such service, the law, as in other like cases, fixed them at "reasonable rates."

IV. That therefore neither party, the State on the one hand or the company on the other, could arbitrarily and conclusively, without the consent of the other, materially change the contract entered into by the charter, and therefore the State could not abrogate or materially
41 change those rates without defendant's consent. But in case any controversy arose as to whether or not the rates charged were unreasonable, the question must be determined, as in other cases, by the courts of justice.

V. That, no complaint being made as to the reasonableness of the charge of one dollar for the services rendered in the present instance, except so far as the act of 1871 assumes to make fifty-seven cents sufficient, in so far as that act was intended to be retroactive and interfered with this one of the most important "vested rights" of the company, it is not binding upon this company, and is null and void as an infringement upon its constitutionally secured rights.

Judgment is therefore rendered and ordered entered in favor of the defendant for the return of the property already taken and now held by the plaintiffs in this action, of the value of one hundred and five dollars as aforesaid, or in case return thereof cannot be had, that defendant recover against the plaintiffs the sum of three dollars and twenty-four cents, the value of its special property therein, and also that the defendant recover his costs in this action.

Dated April 22d, 1872.

C. N. WATERMAN,
Dist. Judge.

42 District court.

STATE OF MINNESOTA.
County of Olmsted, ss:

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. CROUCH, plaintiffs,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, defendant.

This cause having come on for trial before the court, and a jury having been waived by the parties, and the court having made and filed its findings of fact and conclusions of law thereon, therein and thereby directing judgment to be entered for the defendant for a return of the property in the complaint described, or for the recovery of the sum of three and $\frac{24}{100}$ dollars, the value of defendant's special interest in said property, in case a return thereof cannot be had, and for the recovery from the plaintiffs of defendant's costs and disbursements in this action:

Now, therefore, on motion of Mitchell and Yale, esqs., attorneys
43 for defendant, it is adjudged that the defendant recover from the plaintiffs the property in the complaint described, that is to say, two bales of cotton cloth, or the sum of three dollars and twenty-four cents, ($3.24) the value of defendant's special interest therein, in case a recovery of said property cannot be had, and that the defendant recover from the plaintiffs the sum of fifteen and $\frac{15}{100}$ dollars, its costs and disbursements in this action, in all amounting to eighteen and $\frac{39}{100}$ dollars.

Dated May 17th.

C. T. BENEDICT, *Clerk.*

Certificate of transcript.

STATE OF MINNESOTA,
County of Olmsted, ss:

I, C. T. Benedict, clerk of the district court in and for the county of Olmsted, in the State of Minnesota, do hereby certify that I have compared the foregoing with the original notice and bond on appeal and judgment-roll, in an action wherein J. D. Blake et al., are plaintiffs, and The Winona and St. Peter Railroad Company is defendant, re-
44 maining on file in my office, and that the same is a true and perfect transcript of said original.

In testimony whereof witness my hand and the seal of said court, at Rochester, in said county, this 30th day of September, A. D. 1872.

[SEAL] C. T. BENEDICT,
Clerk of the District Court.

(Endorsed as follows:) State of Minnesota. Supreme court, October term, 1872. J. D. Blake et al., appellants, against The Winona and St. Peter Railroad Company, respondent. Return on appeal. Filed October 22d, 1872. Sherwood Hough, clerk. W. P. Clough, att'y for appellants.

45 STATE OF MINNESOTA, *Supreme Court:*

General October term, A. D. 1872.

FRIDAY MORNING, 10 *o'clock*, *November 1st*, *A. D.* 1872.—Court convened pursuant to adjournment, all the justices being present.

JOHN D. BLAKE ET AL., APPELLANTS,
vs.
WINONA AND ST. PETER RAILROAD COMPANY, respondent. } No. 44. 1552.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for the respective parties, submitted to the court for decision, and taken under advisement.

A true record. Attest:

SHERWOOD HOUGH, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest:

SHERWOOD HOUGH, *Clerk.*

(Indorsed:) State of Minnesota, supreme court. Copy of minutes of argument. Filed July 22d, A. D. 1873. Sherwood Hough, clerk.

46 STATE OF MINNESOTA, *Supreme Court:*

October term, A. D. 1872.

JOHN D. BLAKE, ALFRED D. LEET, & STEPHEN V. Crouch, appellants,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, respondent.
No. 44. 1552.

Appeal from district court, 3d judicial district, county of Olmsted.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1872, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things reversed, and that the appellants have possession of the personal property described in the complaint, and that the appellants above named have judgment accordingly.

Entered July 22d, A. D. 1873.

By the court.

Attest:

SHERWOOD HOUGH, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest:

SHERWOOD HOUGH, *Clerk.*

(Indorsed:) No. . State of Minnesota, supreme court. Copy of order for judgment. Filed July 22d, A. D. 1873. Sherwood Hough, clerk. Entered on page .

47 STATE OF MINNESOTA, *Supreme Court:*

October term A. D. 1872.

JOHN D. BLAKE, ALFRED D. LEET, & STEPHEN V. Crouch, appellants,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, respondent.
1552. No. 44.

Pursuant to an order of court duly made and entered in this cause on the 22d day of July, A. D. 1873, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Olmsted, be, and the same hereby is, in all things reversed, and that the appellants recover from the respondent herein, possession of the personal property described in the complaint, viz, two bales of cotton cloth, now in the actual possession of said appellants. And

it is further determined and adjudged that the appellants above-named do have and recover of said Winona & St. Peter Railroad Company, respondent herein, the sum and amount of one hundred & seventy-one dollars and fifty cents, ($171.50,) costs and disbursements in this cause in this court, and that said appellants do have execution for the enforcement hereof.

Dated and signed this 22nd day of July, 1873.

By the court.

Attest:

SHERWOOD HOUGH, *Clerk.*

Statement for judgment

Costs allowed by statute	$25 00
Clerk's fees for making return, &c	13 55
Printer's fees, for printing paper-book, points, & argument	123 75
Clerk's fees, supreme court	8 00
Sheriff's fees	1 20
	$171 50

48 STATE OF MINNESOTA, *Supreme Court, ss:*

I, Sherwood Hough, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of our said supreme court, at the capitol, in the city of St. Paul, this 22d day of July, A. D. 1873.

[SEAL] SHERWOOD HOUGH, *Clerk.*

(Indorsed:) State of Minnesota supreme court. Transcript of judgment. Filed July 22d, A. D. 1873. Sherwood Hough, clerk. W. P. Clough, attorney for appellants.

49 The foregoing papers attached together and endorsed "Judgment-roll. Filed July 22nd, 1873.

"SHERWOOD HOUGH, *Clerk.*"

STATE OF MINNESOTA, *Supreme Court, ss:*

I, Sherwood Hough, clerk of said court, do hereby certify that I have carefully compared the within and foregoing copy with the original record and judgment-roll in the within-entitled action, remaining on file and of record in my office, and that the same is a true and authentic transcript thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Saint Paul, this 8th day of September, A. D. 1873.

[SEAL.] SHERWOOD HOUGH,
Clerk Supreme Court Minnesota.

(Indorsement on cover:) No. 500. The Winona and St. Peter Railroad Company, plaintiff in error, vs. John D. Blake, Alfred D. Leet, and Stephen V. Crouch. Minnesota sup. court. Filed 6th October, 1873.

50 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the supreme court of the State of Minnesota, greeting:

Whereas in a certain suit in said supreme court, between John D. Blake, Alfred D. Leet, & Stephen V. Crouch, plaintiffs, and the Winona and St. Peter Railroad Company, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"1st. That the record does not contain a transcript of the opinion of the supreme court of the State of Minnesota, made and filed in this cause; and

"2nd. That the same does not contain the original petition for the allowance of a writ of error, presented by the plaintiff in error to
51 the chief justice of said State court, and the allowance thereupon of such writ of error."

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court, the seventeenth day of October, A. D. 1873.

D. W. MIDDLETON,
Clerk Sup. Court U. S.

52 STATE OF MINNESOTA, *Supreme Court, ss:*

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

Answer of the justices of the supreme court of the State of Minnesota, as commanded in the within writ.

Dated St. Paul, Minnesota, this 25th day of October, A. D. 1873.

[SEAL.] SHERWOOD HOUGH,
Clerk Sup. C't Minnesota.

(Indorsed:) No. 500. October term, 1873. Certiorari. Supreme Court U. S. The Winona & St. Peter R. R. Co., pl'ff in error, vs. John D. Blake et al. Issued 18 Oct., '73. Rec'd and filed October 23d, 1873. Sherwood Hough, clerk sup. c't of Minnesota.

53 STATE OF MINNESOTA, *Supreme Court:*

JOHN D. BLAKE, ALFRED D. LEET, AND Stephen V. Crouch, appellants,
vs.
THE WINONA AND ST. PETER, RAILROAD, Company, respondent.

To the honorable C. G. Ripley, chief justice of the supreme court of the State of Minnesota:

The petition of the above-named respondent, The Winona & St. Peter Railroad Company, respectfully showeth that said cause came on for

argument, and was argued at the general October term of said court, 1872; and that afterwards, and on the 22d day of July, 1873, the said court made and entered its final judgment therein, whereby it was adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Olmsted, be, and the same thereby was, in all
54 things reversed; and that the appellants recover from this respondent possession of the personal property described in the complaint, and their costs and disbursements in said action.

And your petitioner further showeth that the validity of a statute of the State of Minnesota, to wit, of an act of the legislature of said State entitled "An act to regulate the carrying of freight and passengers on all railroads in this State," approved March 6th, 1871, was drawn in question, in said action in this court, by your petitioner, on the ground of the same being repugnant to the Constitution of the United States, to wit, to section ten, of article one thereof, and the decision of this court, in and by said judgment, was in favor of the validity of said statute, and against your petitioner's said claims of its invalidity.

All of which matters will more fully and particularly appear from the record of said action in this court, a copy whereof is herewith presented to your honor.

Wherefore your petitioner prays your honor that a writ of error
55 to said supreme court of the State of Minnesota, from the Supreme Court of the United States, removing said action into said last-named court for re-examination and reversal or affirmance in accordance with the statutes of the United States in such case made and provided, be forthwith allowed to your petitioner.

Dated July 25, 1873.

THE WINONA & ST. PETER R. R. CO.,
Petitioner.
WM. MITCHELL,
Att'y for Petitioner.

STATE OF MINNESOTA, *ss:*

On reading the foregoing petition, and on an examination of the record of the foregoing entitled action in this court, it by said record appearing that the validity of a statute of the State of Minnesota, to wit, of an act of the legislature of said State, entitled "An act to regulate the carrying of freight and passengers on all railroads in this State," approved March 6th, 1871, was drawn in question, in this court in said action, by the petitioner, on the grounds of the same being repugnant to the Constitution of the United States, to wit, to section ten, of article one thereof, and that the decision of this court, in and by its
56 final judgment in said action heretofore rendered, was in favor of the validity of said statute and against the petitioner's said claim of its invalidity:

Now, therefore, a writ of error to the supreme court of the State of Minnesota from the Supreme Court of the United States, removing said action into said last-named court for re-examination and reversal, or affirmance in accordance with the statutes of the United States in such case made and provided, is hereby allowed to the same petitioner, the Winona and St. Peter Railroad Company.

Witness my hand on this 25th day of July, 1873.

C. G. RIPLEY,
Chief Justice of the Supreme Court of State of Minnesota.

(Endorsed as follows:) "Petition for, and allowance of, writ of error from Supreme Court of U. S. Filed July 25th, 1873. Sherwood Hough, clerk. Wm. Mitchell, att'y for petitioner."

57 Supreme court, October term, 1872.

JOHN D. BLAKE & AL., APPELLANTS,
vs.
WINONA AND ST. PETER RAILROAD COMPANY, respondent.

This action was brought to test the constitutionality of gen. stat. of 1871, ch. 24, entitled "An act to regulate the carrying of freight and passengers on all railroads in this State.

By the rates established by said act the defendant would have been entitled to demand and receive of the plaintiffs, for the service by it performed in the transportation of their goods from Winona to Rochester, the sum of 57 cents.

The sum actually claimed by the defendant, viz, $1, was in accordance with the rates of freight upon property of that kind, established by the regular published tariff bills of defendant, and was the same rate and no greater than that usually charged by defendant for such service.

It was stipulated by the parties in and for all the purposes of
58 this action, that if such act is valid, operative, and applicable to the defendant in this case, that then and in such case judgment should be for the plaintiffs; otherwise for the defendant. The defendant denies its existence and its various rights and franchises, so far as is material to the present question under the following acts of the legislature of the Territory and State of Minnesota. (Laws 1855, ch. 27; 1857, extra session, sub. ch. 2 of ch. 1; ib., ch. 15; special laws 1862, ch. 19; special laws 1866, ch. 6.)

By none of them is any authority to charge any toll for freight or passengers carried over its road expressly granted to defendant.

But the court below finds as follows:

1. That, under and by virtue of the defendant's act of incorporation, and the several other acts pertaining to the subject-matter accepted and acted on by the defendant, it, prior to the passage of said act of 1871, possessed the implied right to transport passengers and freight over its road, and make and receive some charges for such service.

2. That this right, though one arising by necessary implication only is one of the essential franchises of the corporation which became vested in the company immediately upon its acceptance of its charter,
59 and immediately became as sacred as any other of its rights.

Whether or not the district court was right in thus concluding it is unnecessary to consider. We assume, for the purposes of this case, that it was, and that the defendant possessed, as one of its essential franchises, the vested right to demand and receive some charges for such transportation of freight and passengers.

We are, nevertheless, of the opinion that the act in question is valid, operative, and applicable to the defendant in this case.

It is admitted to be so, unless it conflicts with those provisions of the State and Federal constitution which prohibit the passage of laws impairing the obligation of contracts, or unless it is an usurpation by the legislature of judicial authority.

The contract between the State and the defendant is (as we assume) that it may make some charges for such service as aforesaid. Its char-

ter may be amended by any subsequent legislature in any manner not destroying or affecting defendant's vested rights. (Sec. 15.)

The act in question fixed a maximum toll for the transportation of such goods as those in question in this case over the defendant's
60 road.

Does it impair the obligation of the contract above stated for the State thus to fix a limit to the amount the defendant may charge?

This right to demand and receive some toll is, we assume, one of its essential franchises. A franchise which in England is a branch of the royal prerogative, subsisting in the hands of a subject in this country can only be derived from the legislature. Franchises are here, as in England, privileges of the sovereign in the hands of the subject. Whoever claims an exclusive privilege with us must show a grant from the legislature. A privilege or immunity of a public nature, which cannot be legally exercised without legislative grant, is a franchise. (2 Bl. Com., 37; 2 Kent, 459; Peo. vs. Utica Ins. Co., 15 Johns, 358.)

Inasmuch as it is the duty of the Government, with respect to the welfare of the public in general, and of trade in particular, to provide safe and commodious ways of communication, whence flows the right of the State to oblige those who make use of the ways it provides to contribute to the expense of making and maintaining them, i. e., to
61 levy tolls, it follows that the right to make roads and levy toll is a prerogative of sovereignty, and in the hands of a subject is a franchise—a privilege or immunity of a public nature which cannot be legally exercised without legislative authority. (Vattel, book 1, ch. 9, §' 101, 102; 2 Kent, p. 458, 459.)

Nor is there now any question, at least in this court, that the right to make and maintain a railway and take tolls or fares is such a privilege or immunity for the same reason that the right to build an ordinary road and levy tolls thereon is, viz, that a railroad is but an improved modern highway, one which it is the duty and interest of the government to construct where the public interest and convenience demand it. Davidson vs. Ramsey Co., 18 Minn.; 18 Wend., p 47; Sharpless vs. Mayor, &c., 21 Penn. St., 147; 25 Vt., 433, p. 441. See also Olcott vs. Supervisors Fon du Lac Co., U. S. Supreme Court, Dec. tr., 1872.)

This franchise of the defendant, then, is a privilege of the sovereign in the hands of a subject. The subject is indeed in the present case an artificial being. But the sovereign might have placed this privilege in the hands of a natural person, and it might have been *his*
62 property as it is the defendant's property. In the use the defendant shall make of its property, this defendant is as entirely subject to legislative control as such supposed natural person would have been. (11 Minn., 515.)

The franchise in question being a privilege of the sovereign, and which the sovereign could alone impart, was originally in the sovereign's control in every respect.

It was, therefore, entirely competent for the legislature in conferring such franchise to retain authority to control the defendant in its exercise.

Possessing such right originally, it must continue to possess it, that is to say, it must retain it in any given case in so far as it does not part with it by confirming exemption therefrom upon the recipient of the franchise. It follows as respects this franchise that the sovereign which conferred it retains its original right to control the defendant in its exercise of the same, in so far as it has not sur-

rendered its authority. The contract here, we assume, is that the defendant may take some tolls. That is what the sovereign granted
63 it. To the extent to which such a grant necessarily involves exemption from legislative control as aforesaid, the sovereign has surrendered such original right of control no further. "The legislature may also from time to time regulate the use of the franchise and limit the amount of the toll which it shall be lawful to take, in the same manner as they may regulate the amount of toll to be taken at a ferry or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road." (Per Walworth ch., in Beekman vs. Saratoga & Schenectady R. R., 3 Paige, 45.)

The position above quoted was not necessary to the decision of the case before him, but we cite it as expressing our own views as well as those of an eminent jurist on this point, expressed when railroads were in their infancy.

It is one of those plain and simple propositions as it seems to us upon which, because it is so indisputably true, there can be no accumulation of authorities.

But before railroads were known in this country a similar
64 position had been taken with respect to a ferry franchise. "The legislature," says Chief J. Parker, "having originally the only right to grant the exclusive privilege of transportation over public waters, and to establish tolls, &c., the grant of this privilege would always be considered as subject to the superintendence of the legislature unless that was expressly surrendered." (Charles River Br. vs. Warren B., 7 Pick., 511.)

Has the State surrendered it with respect to this highway?

Is an agreement that the defendant may take some tolls expressly or by necessary implication an agreement that the State will never assume to regulate the use of the franchise and limit the amount of tolls the defendant may take? This question must be answered in the negative. The State, we assume, has conferred upon the defendant the right to make some charge, i. e., to take some toll. Not any specified rates of toll, nor to take tolls within any designated limits, nor to take reasonable tolls. The right conferred is simply to take tolls. If this right cannot in the nature of things exist along with the right aforesaid
65 in the legislature to regulate its use and limit the amount of tolls the defendant may take, then of course the right of control is gone.

But it is obvious that the two can co-exist, e. g., a right simply to take some toll can be exercised to its full extent under a law fixing a maximum rate of toll, for in taking such maximum rate some toll is taken, and the extent of the right is only to take some toll. As, therefore, the fixing of maximum rates of toll by the act of 1871 does not interfere with defendants' right to take some tolls, it is not unconstitutional, as impairing the obligation of any contract between the defendant and the State, and it was competent for the legislature to enact it, in the exercise of its unsurrendered authority, to control the defendant in the exercise of the franchise conferred. Nor is the act in question an usurpation by the legislature of judicial authority. The legislature represents the sovereign in two capacities. First, it represents the sovereign as a party contracting with defendant. Second, as the sole law-making power. In the latter capacity it acts for the sovereign in exercising the sovereign right of control over franchises in the hands of the subject.

66 And as this right of control can only be exercised through the establishment of some rule of conduct, that is to say, by some law, it is necessarily the function of the legislature, as the sole law-making power, to establish such rule of conduct by legislation. We have said that the franchise in question is not the right to take reasonable tolls. As the respondent contends that it is, and its argument to prove this act unconstitutional is wholly based on that proposition, it is necessary to state the grounds of our own opinion.

The right to take some toll under this charter is, as the court below found, but an implied right. It arises by necessary implication only, if it arises at all.

It can also be by necessary implication only, if at all, that it is a right to take reasonable toll.

"Whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant." (Co. Lit., 56, *a*, Plowd., 317; Saunders' case, 5 Co., 12; Morton, J., in Charles River Br. vs. Warren Bridge, 7 Pick., 345, p. 459.) Without undertaking to pass upon the correctness of this position applied, as the learned judge applied
67 it, to grants from the State, the converse of the proposition will probably be admitted to be true, viz., that nothing which is not thus essential will be thus implied. It is certainly not essential to the enjoyment of a right to take some toll that the toll to be taken should be reasonable.

Therefore a right to take reasonable toll is not implied in the case before us.

The court below, however, finds as follows on this point, viz:

3d. That in the absence of any provision in the charter or other acts accepted by the defendant, fixing the amount of the charges for such service, the law, as in other like cases, fixes them at reasonable rates.

Its reasons for the conclusions are thus stated: "On this point it would seem that there can be no essential difference between this and any ordinary contract similar in character between private individuals, the contract on the one hand calling for the performance of certain labor or other duties, and on the other no compensation being specially fixed. The law in that case, as in this, would fix the compensation at a reasonable one, to be determined, in case of controversy, by judi-
68 cial examination and determination from all the facts of the case."

The district court here, as it seems to us, confounds two entirely different things.

The "other like cases" by which the court was guided in arriving at its said conclusion, are the contracts between private individuals above mentioned. As, if one agrees to perform work and labor for me, and I agree that I will pay him for it, without more, he can recover upon a quantum meruit, because the law implies a promise on my part to pay him what such service was reasonably worth.

But that is not a "like case" to the contract before us between the State and this defendant, with respect to which our inquiry is, What did the State grant?

The contract before us is not a contract by the defendant, on the one hand, to perform labor or other service for the State, and by the State, on the other hand, to pay defendant for the same.

It is a contract by which the State granted to the defendant the exclusive right to make, maintain, and operate this highway with
69 its cars and engines, and to levy a toll upon that portion of the public using the same.

The State may be supposed to have been moved to make the grant by

considerations of the *the* benefit expected to accrue to the public, by the making and maintenance of this highway by the defendant.

The service for which the district court finds that the defendant is entitled to receive what it is reasonably worth, is performed for those who travel and send goods over its road; those as to whom if the defendant were an ordinary carrier on the highway the law, in the absence of special contract, would imply a promise to pay what such service was reasonably worth.

The contract the district court had in mind was a supposed implied contract between defendant and these plaintiffs, for instance, or any other individual for whom it carries freight, that in consideration of such carriage, the consignor will pay a quantum meruit therefore. But it takes toll by virtue of no such implied contract.

70 The title of the defendant to its right to demand compensation for this service is not derived to it upon common-law principles and is not to be measured by the rules of the common law; and whether it may lawfully demand compensation from a person who uses its highway for the carriage of goods in the only way in which it can be used depends upon the language of its charter and not upon the rules of the common law. (Perrine vs. Canal Co., 9 Howard, 182.)

The right to exact tolls or charge freights is granted for a service to the public. The defendant is compellable to permit the public to use this highway in the way in which it can be used. (Alcott vs. Supervisors, supra.)

Being a public highway the defendant's road under this charter, is as free to the public paying toll as any other highway, and it would certainly have been none the less a public highway, if the legislature, contrary to what we have assumed to be the case, had not granted to defendant the right to take toll. If it had accepted a charter which denied to it the right to take toll, it is impossible to see upon

71 what principle it could contend, that it was not compellable to permit the public to use it without paying toll.

It is certain that the defendant's right to toll does not vest upon any implied promise on the part of these plaintiffs, for instance, or any other consignor to pay it what the transportation of their property was reasonably worth. (Perrine vs. Canal Co., supra.)

The defendant owns the right to levy a toll. It was an attribute of sovereignty, and the sovereign has granted it to the defendant. The contracts between individuals to which the district court refers, have no analogy, therefore, to the contract before us. They furnish no basis for a conclusion that in the present case the sovereign has agreed with the defendant that it may demand and receive from those who use its roads what such use is reasonably worth.

The State granted to defendant this right to levy some toll. The contract does not fix the rates of toll which it may levy. The only logical conclusion is that the defendant may fix them itself subject to legislative superintendence.

72 What was said by Mr. Justice Morton, in the Charles River Bridge case, is applicable here, except as to any agreement from usage.

"It is apparent from the examination of the several acts and the usage under them, that college took and held the (ferry) franchise, subject to the general superintendence and regulation of the legislature of the Commonwealth.

"Neither the management of the ferry nor the number of boats to be employed, nor the rate of toll, is established in either of these acts.

Was the power to regulate these subjects granted to the college or reserved to the legislature? If the former, the public convenience, so far as related to transportation across the river by this ferry, was made to depend upon the pleasure of an interested corporation, instead of the sovereign power of the State. It cannot be supposed that the college had the exclusive right to the transportation across the river, and also the unlimited power to fix the rate of toll for such transportation. The college, in accepting the right granted, assumed corresponding obligations,

73 "If they were to receive the profits of the ferry, they were bound to furnish reasonable accommodation for the public to submit to the general regulation of ferries throughout the State, and to take such just and reasonable toll as from time to time the legislature should establish." (p. 448.)

It may be asked if this is the only limit; if the defendant can oppress the public with impunity, by exacting excessive tolls, so long as the legislature does not see fit to interfere? It is not necessary to consider how, upon our assumption aforesaid, it might have been under the defendant's original act of incorporation, and other acts relating to it prior to the act of Feb. 28, 1866. That act, which the defendant accepted, extended the time for its performance of the conditions upon which any right on its part to the franchises which it now owns was contingent, but upon the express condition that it should "be bound to carry freight and passengers upon reasonable terms." There was, therefore, prior to the act of 1871, that express limitation upon any discretionary right to fix the rate of toll and fare.

Nor does the act of 1866 imply any surrender by the State of

74 its power to regulate tolls. There can be no plainer non sequitur than to say that because the defendant cannot rightfully levy excessive toll, therefore the State has parted with its right to regulate its rates of toll.

As these considerations dispose of the present case, it is unnecessary to consider whether, supposing the conclusion of the district court last above noticed to be a correct one, its conclusion that the act of 1871 aforesaid was unconstitutional would necessarily follow, and as to that we give no opinion.

In conformity with the agreement of the parties, the judgment appealed from must be reversed, and judgment entered for the plaintiffs.

RIPLEY.

(Endorsed:) Opinion. Filed May 27th, 1873. Sherwood Hough, clerk.

75 STATE OF MINNESOTA,
Supreme Court, ss:

I, Sherwood Hough, clerk of the supreme court of said State of Minnesota, do hereby certify that I have carefully compared the within and foregoing copies with the original opinion of said court, made and filed in the cause therein entitled, and the original petition for a writ of error, and order allowing the same, in the within-entitled action, remaining on file in my office, and that the same are true and authentic transcripts of said originals.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Saint Paul, this 25th day of October, A. D. 1873.

[SEAL.] SHERWOOD HOUGH, *Clerk.*

(Indorsed:) Supreme Court of the United States. The Winona & St. Peter Railroad Company, pl'ff in error, vs. John D. Blake et al., def'ts in error. Return to writ of certiorari. W'm Mitchell, att'y for pl'ff in error.

(Indorsement on cover:) No. 210. The Winona and St. Peter Railroad Company, plaintiff in error, vs. John D. Blake, Alfred D. Leet & S. V. Crouch. Certiorari and return. Filed 30th October, 1873.

Supreme Court of the United States.

OCTOBER TERM, 1875.

THE WINONA & ST. PETER RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN D. BLAKE *ET AL.*,
Defendants in Error.

Appeal from the Supreme Court of Minnesota.

BRIEF AND ARGUMENT.

B. C. COOK, Attorney.

CHICAGO, ILL.:
CHARLES E. SOUTHARD, PRINTER, 175 MONROE STREET.
1875.

Supreme Court of the United States.

OCTOBER TERM, 1875.

THE WINONA & ST. PETER RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN D. BLAKE *ET AL.*,
Defendants in Error.

Appeal from the Supreme Court of Minnesota.

BRIEF AND ARGUMENT.

B. C. COOK, Attorney.

CHICAGO, ILL.:
CHARLES E. SOUTHARD, PRINTER, 175 MONROE STREET.
1875.

STATEMENT OF THE CASE.

The plaintiff in error is a railroad corporation, organized under the laws of the Territory of Minnesota and the State of Minnesota. On the first day of June, 1871, defendants in error shipped two (2) bales of cotton cloth, of the value of one hundred and five (105) dollars, from Chicago, Illinois, by railroad, consigned to themselves, at Rochester, Minnesota. The plaintiff in error transported said goods from Winona to Rochester, over its road, a distance of fifty (50) miles. The weight of the property was two hundred and eighty (280) pounds; and it was the kind of merchandise usually denominated, on railroads, first-class. The plaintiff in error paid, at Winona, two (2) dollars and twenty-four (24) cents, back charges, on said property, and transported the property to Rochester, fifty (50) miles, over its road. When the goods arrived at Rochester, defendant in error offered to pay the two (2) dollars and twenty-four (24) cents, back charges, which had been paid by plaintiff, and the further sum of fifty-seven (57) cents, as freight charges from Winona to Rochester. The plaintiff claimed the sum of one (1) dollar freight from Winona to Rochester, which was its tariff rate, and the rate usually charged by it for like services. Defendant refused to pay for the transportion from Winona to Rochester more than the fifty-seven (57) cents. It was

stipulated between the parties that, if the provisions of the act of the Legislature of Minnesota, of March 6th, 1871, fixing the rate of freight and fare that might be charged by said plaintiff in error, were valid, operative and applicable in this case, then the judgment should be for the defendant in error; otherwise, for the plaintiff in error. It was found, as matter of fact, by the Court before whom the case was tried, that no complaint was made as to the reasonableness of the charge of one (1) dollar for the services rendered in the present instance, except so far as the act of 1871 assumes to make fifty-seven (57) cents sufficient compensation. The District Court found, also, "that, under and by virtue of the defend-"ant's act of incorporation, and the several other acts per-"taining to the subject matter, accepted and acted upon prior "to the passage of said act of 1871, the plaintiff in error "possessed the implied right to transport freight and passen-"gers over its road, and make and receive some charges for "such service; that this right, though one arising by necessary "implication only, is one of the essential franchises of the "corporation, which became vested in the company immedi-"ately upon its acceptance of its charter, and immediately "became as sacred as any other of its rights."

The District Court rendered judgment in favor of the plaintiff in error. An appeal was taken to the Supreme Court of the State, in which Court the judgment of the District Court was reversed, and judgment rendered in favor of the defendants in error for the possession of the property and costs; from which decision a writ of error is prosecuted to this Court.

ERRORS ASSIGNED.

The errors relied on for the reversal of this judgment are:

First.—The Court erred in deciding that the act of March 6th, 1871, was valid, operative and applicable to the plaintiff in error in this case.

Second.—The act of March 6th, 1871, was invalid because it was a violation of section 10, article 1, of the Constitution of the United States.

Third.—The said act was invalid because it was a violation of section 1 of article 14 of the Constitution of the United States.

I have prepared and filed with this Argument printed copies of the acts of the Legislative Assembly of the Territory of Minnesota, and of the Legislature of the State of Minnesota, relating to the incorporation of the plaintiff in error, and the various amendments to its charter under which it is now organized.

In support of the proposition that the law of March 6th, 1871, was not valid, and binding upon and applicable to the plaintiff in error, in this case, I make the following

POINTS.

I.

Express authority was given to the Directors of the Winona and St. Peter Railroad Company to fix equal and reasonable rates of compensation for the transportation of persons and property over its railroad, by the charter of the company, the laws amendatory thereof, and by section four of article ten of the Constitution of the State of Minnesota.

AUTHORITIES.

Charter of the Transit Railroad Company, March 3, 1855, sections 2 and 15.

Charter of the Minnesota & Pacific Railroad Company, May 22, 1857, chapter 1, section 7; chapter 2, section 1; chapter 3, section 8.

Act of March 10, 1862, sections 1 and 10.

Act of February 28, 1866.

Act of March 3, 1871.

Section 4, article 10, Constitution of Minnesota. All of which are cited below.

II.

That, if no express authority has been given to the plaintiff in error, by law, to fix such rates of compensation, still such authority is necessarily incident to and implied from the powers expressly given to said corporation by its charter.

AUTHORITIES.

Lord vs. Sidney City Commissioners, 12 Moore, P.C.C. 473.

Gould vs. Great Western Deep Coal Co., 12 L. T., [N. S.] 842.

III.

If the power to fix equal and reasonable rates of compensation is not given to said corporation by express words of its charter and the acts amendatory thereof, and if such power does not arise by necessary implication from the language used in said acts, still the right to charge equal and reasonable compensation for the use of its property, the personal services of its agents and the risk it assumes in relation to the property transported by it, is a necessary incident to the ownership of the property, a right to the use of the property being property in itself, of which the owner can not be deprived but by due process of law.

AUTHORITIES.

The P., W. & B. R. R. Co., vs. Thomas Bowers, Court of Errors and Appeals, Delaware, June term, 1873.

Whiting vs. Sheboygan & Fond du Lac R. R. Co. *et al.*, 25 Wisconsin, 167.

People ex rel. vs. Salem, 20 Michigan, 477.

People vs. Batchellor, 53 New York, 140.

Trustees, &c., vs. Auburn & Rochester R. R., 3 Hill, 570.

Bonaparte vs. Camden & Amboy R. R., 1 Baldwin, C.C.,205.

Ohio, &c., R. R. Co. vs. Ridge, 5 Blackf., 78.
Dearborn vs. Boston & Montreal R. R., 4 Fos., 179.
Tinsman vs. Belvidere Delaware R. R. Co., 2 Dutch, 148.
Donnaher vs. State of Mississippi, 8 S. & M., 649.
State Freight Tax Case, 15 Wallace, 232.
Von Hoffman vs. City of Quincy, 4 Wallace, 584.

IV.

If the right to fix equal and reasonable rates of compensation for the transportation of persons and property over its road became vested in the plaintiff in error in either of the ways suggested in the foregoing propositions, the enjoyment of such right became part of the contract, which can not be impaired by any law of the State of Minnesota, because such law would be repugnant to section 10 of article 1 of the Constitution of the United States.

AUTHORITIES.

Dartmouth College vs. Woodward, 4 Wheaton, 513.
Binghampton Bridge Case, 3 Wallace, 71.
Miller vs. The State, 15 Wallace, 488.
Holyoke Co. vs. Lyman, 15 Wallace, 511.
Tomlinson vs. Jesup, 15 Wallace, 457.
Wilmington R. R. Co. vs. Reid, 13 Wallace, 266.
Delaware R. R. Tax Case, 18 Wallace, 225.
Trustees of Canal Co. vs. Beers, 2 Black, 448.
Bridge Proprietors vs. Hoboken Co., 1 Wallace, 116.

Dodge vs. Woolsey, 18 Howard, 331.
Jefferson Bank vs. Skelly, 1 Black, 436.
Gordon vs. Appeal Tax, 3 Howard, 145.
Piqua Bank vs. Knoop, 16 Howard, 381.
Bush vs. Shipman, 4 Scammon, 190.
Bruffett vs. G. W. R. R. Co., 25 Illinois, 355.
Neustadt vs. Ill. Cent. R. R. Co., 31 Illinois, 484.
W. & St. P. R. R. Co. vs. Waldron, 11 Minnesota, 515.

V.

The right to receive reasonable and equal compensation for the use of its property and the personal services of its agents and servants necessarily engaged in the use of such property, is itself property of which the plaintiff in error can not be deprived without due process of law, under section 1 of article 14 of the Constitution of the United States. An act of the Legislature is not such due process of law.

AUTHORITIES.

Pumpelly vs. Green Bay Co., 13 Wallace, 177.
Sinnickson vs. Johnsons, 2 Harrison, N. J., 129.
Gardner vs. Newburgh, 2 Johnson, 162.
Rowe vs. Granite Bridge Co., 21 Pickering, 334.
Canal Supervisors vs. The People, 17 Wendell, 604.
Lackland vs. The N. M. R. R. Co,, 31 Mo., 180.
Stevens vs. Middlesex Canal, 12 Mass., 426.
Howell vs. Bristol, 8 Bush. (Ky.), 499.

VI.

The act of March 6th, 1871, was not valid, operative and applicable to the plaintiff in error in this case, because to apply the act to this case would be to hold that the State of Minnesota had the right to regulate commerce between the State of Illinois and the State of Minnesota, which would be in contravention of section 8, of article 1, of the Constitution of the United States.

AUTHORITIES.

State Freight Tax Case, 15 Wallace, 232.
Hanson vs. Vernon, 27 Iowa, 28.

[redacted] ARGUMENT.

The first proposition of law that I desire to state, and to establish by authority, is, that the different charters under which the Winona and St. Peter Railroad Company is now organized, when passed by the Legislature either of the Territory or of the State of Minnesota, and accepted by the railroad company, and acted upon by it, became contracts between the Territory or the State and the railroad company, and could not be impaired by the State, being protected by the Constitution of the United States.

I hardly think that this proposition will be controverted, and I assume the probably unnecessary task of citing authorities in its support, because the points of law hereinafter stated rest upon this proposition, and, consequently, because it has sometimes been questioned whether the doctrine of the Dartmouth College case should properly be applied to the charters of railroad corporations. I shall content myself with citing authorities not upon the general proposition discussed in that case, but upon the question whether the charters of railroad companies are within the operation of the rule then settled. The reason given by those who contend that the doctrine of the Dartmouth College case does not apply to the charters of railroad corporations is, that such corporations are created for a public purpose, and endowed

with valuable franchises by the public for the public benefit; a reason manifestly inadequate, unless it be true that a corporation created for a public use has no power to contract with the State by which it was created. I apprehend the true distinction is this: corporations are sometimes created by the mere will of the Legislature, there being no other party whose assent is required. To such a corporation a portion of the power of the Legislature is granted, to be exercised *exclusively* for the public good, and subject at all times to be changed, modified or repealed. These are public corporations, subject to the will of the Legislature. Corporations are sometimes created not by the mere will of the Legislature, but the result of an agreement or contract—an act of the Legislature on one part, and an acceptance and acting under a charter on the other part. The public, represented by the Legislature, is not the only party in interest; for, although it has a public purpose to be accomplished, it chooses to accomplish that purpose through the instrumentality of private parties. Thus the public, represented by the Legislature, and the private parties, make an agreement or contract. The Legislature, on its part, confers upon private parties certain privileges, powers and capacities, for which the expectation of benefit to the public is the moving consideration. The private parties agree to expend their money for this public purpose, for the consideration of an anticipated remuneration promised them by the charter. I insist that this constitutes a contract which can neither be modified nor annulled by one party without consent of the other. The sole object of the Legislature, in granting the charter, may be the use and benefit which would result to the public from the

construction of a railroad; but where the profits thereof belong not to the public, but to private individual stockholders, the corporation is private and not public.

Cooley on Con. Lim., 279.
Mills vs. Williams, 11 Iredell, 561.
Angell & Ames on Corporations, sec. 31.
2 Kent's Commentaries, 275.
3 Hill, 531.
10 Barbour, 234.

I think it may be demonstrated by the repeated decisions of this Court, which have been clear, uniform and distinct, that the proposition above cited is settled law, and that the clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract does apply to the charters of the plaintiff in error in this case.

In the Binghampton Bridge case, 3 Wallace, 71, Mr. Justice Davis, in delivering the opinion of this Court, says:

"The constitutional right of one Legislature to grant "corporate privileges and franchises so as to bind and "conclude a succeeding one has been denied. We have "supposed, if any thing was settled by an unbroken course "of decisions in the Federal and State courts, it was, that an "act of incorporation was a contract between the State and "the stockholders. All courts at this day are estopped from "questioning the doctrine. The security of property rests "upon it, and every successful enterprise is undertaken in "the unshaken belief that it will never be forsaken.

"A departure from it *now* would involve dangers to society "that can not be foreseen, would shock the sense of justice of "the country, unhinge its business interests, and weaken, if "not destroy, that respect which has always been felt for the "judicial department of the Government. An attempt even to "reaffirm it could only tend to lessen its force and obligation. "It received its ablest exposition in the case of Dartmouth "College vs. Woodward, which case has ever since been "considered a landmark by the profession, and no court has "since disregarded the doctrine that the charters of private "corporations are contracts, protected from invasion by the "Constitution of the United States, and it has since so often "received the solemn sanction of this Court, that it would "unnecessarily lengthen this opinion to refer to the cases or "even enumerate them.

"The principle is supported by reason as well as authority. "It was well remarked by the Chief Justice, in the Dartmouth "College case, 'that the objects for which a corporation is "'created are universally such as the Government wishes to "'promote. They are deemed beneficial to the country, and "'this benefit constitutes the consideration, and in most "'cases the sole consideration, for the grant.' The purposes "to be attained are generally beyond the ability of individual "enterprise, and can only be accomplished through the aid of "associated wealth. This will not be risked unless privileges "are given and securities furnished in an act of incorporation. "The wants of the public are so imperative, that a duty is "imposed on Government to provide for them; and as "experience has proved that a State should not directly

"attempt to do this, it is necessary to confer on others the "faculty of doing what the sovereign power is unwilling "to undertake. The Legislature, therefore, says to public- "spirited citizens: 'If you will embark with your time, "'money and skill in an enterprise which will accommodate "'the public necessities, we will grant to you, for a limited "'period, or in perpetuity, privileges that will justify the "'expenditure of your money and the employment of your "'time and skill.' Such a grant is a contract, with mutual "considerations, and justice and good policy alike require "that the protection of the law should be assured to it."

In discussing the rule of law as applicable to a railroad charter, in the case of Miller vs. the State, 15 Wallace, 488, Mr. Justice Clifford, in delivering the opinion of the Court, says: "Corporate franchises granted to private corporations, "if duly accepted by the corporators, partake of the nature "of legal estates, and the grant, under such circumstances, if "it be absolute in its terms, and without any condition or "reservation importing a different intent, becomes a contract "within the protection of that clause of the Constitution "which ordains that no State shall pass any law impairing "the obligation of contracts. Charters of private corporations "are regarded as executed contracts between the State and "the corporators, and the rule is well settled that the Legis- "lature, if the charter does not contain a reservation, or other "provision, modifying the limit or nature of the contract, can "not repeal, impair or alter such a charter against the con- "sent, or without the default of the corporation, judicially "ascertained and declared. Subsequent legislation, altering or

"modifying such a charter, where there is no such reserva-
"tion, is plainly unauthorized, if it is prejudical to the rights
"of the corporators, and was passed without their consent."

In the case of the Holyoke Co. vs. Lyman, 15 Wallace, 511, Mr. Justice Clifford, in delivering the opinion of the Court, says: "Such a charter, when accepted by the incorpo-
"rators, is undoubtedly a contract that the powers, privileges
"and franchises granted shall not be restrained, controlled or
"destroyed without their consent, unless a power for that
"purpose is reserved to the Legislature in the act of incorpo-
"ration, or in some prior general law in operation at the time
"the act of incorporation was passed. Private charters of
"the kind are held to be contracts, because they are based
"for their consideration on the liabilities and duties which
"the corporators assume by accepting the terms therein speci-
"fied; and the general rule is that the grant of the franchise
"on that account can no more be resumed by the Legislature,
"or its benefits diminished or impaired, without the assent of
"the corporators, than any other grant of property, or legal
"estate, unless the right to do so is reserved in the act of incor-
"poration, or by some immemorial usage, or general law of the
"State, which was in operation at the time the charter was
"granted. Charters of private corporations duly accepted, it
"must be admitted, are executed contracts."

In the case of Tomlinson vs. Jesup, 15 Wallace, 457, Mr. Justice Field, in delivering the opinion of the Court, says, in speaking of the charter of the North-Eastern Railroad Company: "It is true that the charter of the company, when

"accepted by the corporators, constituted a contract between "them and the State, and that the amendment, when ac- "cepted, formed a part of the contract from that date, and "was of the same obligatory character."

In the case of the Wilmington Railroad vs. Reid, 13 Wallace, 266, Mr. Justice Davis, in delivering the opinion of the Court, and speaking in reference to the charter of the Wilmington Railroad Company, uses the following language: "It has been so often decided by this Court that a charter "of incorporation granted by a State creates a contract be- "tween the State and the corporators which the State can not "violate, that it would be a work of supererogation to repeat the "reasons on which the argument is founded. It is true that, "when a corporation claims an exemption from taxation, it "must show that the power to tax has been clearly relin- "quished by the State, and if there be a reasonable doubt "about this having been done, that doubt must be solved in "favor of the State. If, however, the contract is plain and "unambiguous, and the meaning of the parties to it can be "clearly ascertained, it is the duty of the Court to give effect "to it, the same as if it were a contract between private per- "sons, without regard to its supposed injurious effects upon "the public interests."

In the Delaware Railroad Tax Case, 18 Wallace, 225, Mr. Justice Field, in delivering the opinion of this Court, and speaking in reference to the charter of the Wilmington and Susquehanna Railroad Company, says:

"That the charter of a private corporation is a contract

"between the State and the corporators, and within the pro-
"vision of the Constitution prohibiting legislation impairing
"the obligation of contracts, has been the settled law of this
"Court since the decision in the Dartmouth College case, nor
"does it make any difference that the uses of the corporation
"are public, if the corporation itself be private. The contract
"is clearly protected from legislative interference, whether
"the public are interested in the exercise of its franchises or
"the charter be granted for the sole benefit of its corporators.
"This doctrine is not controverted by any one; it is the
"established law."

I have cited the foregoing cases because they state the proposition upon which I rely so clearly and distinctly; and I deem it unnecessary to refer to the many other cases in this Court holding the same doctrine. I think it may be affirmed with entire confidence that this Court has always construed the Constitution of the United States as denying to any State Legislature the power to impair a contract between a State and a corporation such as is contained in the charter of the plaintiff in error in this case.

In the State of Minnesota, where these charters were granted, the same rule has been declared by the Supreme Court. In the case of the Winona & St. Peter Railroad Company vs. Waldron, 11 Minn., 534, the Court says, in construing the charter of this company, "That the charter of
"a private corporation is a contract there is no doubt, and
"that in the absence of express limitation or restriction, the
"corporation takes the franchises with all reasonable and

"necessary incidents to accomplish the object of its existence "granted by the charter as vested rights will not be doubted."

The rule has been universally recognized in the State Courts.

Michigan:

People vs. J. & M. Plank Road Co., 9 Mich., 285.

Connecticut:

Washington Bridge Co. vs. The State, 18 Conn., 53.

New Jersey:

Bridge Co. vs. Hoboken Co., 2 Beasley, 81.

Bonaparte vs. Camden & Amboy R. R. Co., 1 Baldwin C. C., 222.

Tinsman vs. Belvidere Delaware R. R. Co., 2 Dutch, 148.

Vermont:

Thorp vs. R. & B. R. R. Co., 27 Vt., 140.

Indiana:

Smead *et al.* vs. Indianapolis, Pittsburgh & Cleveland R. R. Co., 11 Ind., 104.

Massachusetts:

Central Bridge Co. Case, 15 Gray, 106.

Boston & Lowell R. R. Co. vs. Salem & L. R. R. Co., 2 Gray, 1.

Commonwealth vs. New Bedford Bridge, 2 Gray, 339.

Commonwealth vs. Essex Co., 13 Gray, 239.

Wells vs. Stillson, 2 Mass., 146.

Commonwealth vs. Bank, 21 Pickering, 535.

Delaware :

Ten Eyck vs. D. R. R. Canal Co., 3 Harr., 200.

Pennsylvania :

Penrose vs. Erie Canal Co., 56 Penn. St., 46.
Commonwealth vs. Cullen, 13 Penn. St., 133.
Reed vs. Penrose, 2 Grant's Cases, 472,
Brown vs. Hummel, 6 Barr, 86.
Turnpike Co. vs. Wallace, 8 Watts, 316.

Maine :

Coffin vs. Rich, 45 Maine, 507.
Nichols vs. Kennebeck R. R. Co., 43 Maine, 351.

California :

Robinson vs. Magee, 9 Cal., 91.
Smith vs. Morse, 2 Cal., 524.

New Hampshire :

Backus vs. Lebanon, 11 N. H., 19.

Arkansas :

United States vs. Conroy, 1 Hempstead, 313.

Mississippi :

Commercial Bank vs. State, 6 Smedes & Marshall, 599.
O'Donnell vs. Bailey, 24 Miss., 386.
New Orleans R. R. Co. vs. Harris, 27 Miss., 527.

Missouri :

Gorman vs. Pacific R. R. Co., 26 Mo., 441.

North Carolina :

R. & G. R. R. Co. vs. Davis, 2 Dev. & Battel, 451.
Bank of the State vs. Cape Fear Bank, 13 Iredell, 75.

New York:

People vs. Hills, 46 Barbour, 340.

Benson vs. Mayor of New York, 10 Barbour, [S. C.] 223.

Brooklyn Central R. R. Co. vs. Brooklyn City R. R. Co., 32 Barbour, 358.

People vs. Manhattan Co., 9 Wendell, 351.

Kentucky:

Hamilton vs. Kult *et al.*, 1 Amer. Corpora. Cases, 549.

Slack vs. M. & L. R. R. Co., 13 B. Monroe, 1.

Georgia:

Aycock vs. Martin, 37 Ga., 124.

Winter vs. Jones, 10 Ga., 190.

If any rule of law can be held to be fixed and settled beyond controversy by the concurrent decisions of all the American courts, this rule of law may be considered as thus settled. I have cited so large a number of cases not for the purpose merely of showing what the rule of law was, but also for the other purpose of showing upon what consideration the stockholders of this railroad company advanced the money for its construction. It is beyond dispute that this money was advanced by these corporators with the distinct understanding that the law as settled by the American courts was, that the charter of this road was a contract, and that the rights secured to them as stockholders of this road could not be taken away from them by the Legislature without their consent. If it should now be holden that the doctrine of the Dartmouth College case either was not the law as it was stated in the opinion of this Court in that case, or if it shall be held that the doctrine

of that case does not apply to the charters of railroad corporations, one fact is clear, that, when the stockholders of this road advanced their money for its construction, they had the strongest assurance possible to be given that they could not be deprived of the benefits secured to them by that charter without their consent, which leads me to the discussion of the second point which I desire to make in this case.

II.

Where the law has been settled by repeated and uniform decisions of the Court of last resort, whose province it is to construe the Constitution and determine its effect, to change the ruling so as to deprive the stockholders of this railroad company of the protection of the Constitution to which the courts declared them to be entitled when they invested their money in this enterprise, and upon the faith of which ruling the money was thus invested, is contrary to those fundamental principles of justice and equity which are the foundation of all law. Said Chief Justice Taney, in the case of the Ohio Life Insurance and Trust Company vs. Debolt, 16 Howard, 432, "If the "contract when made was valid by the laws of the State, as "then expounded by all departments of its government and "administrated in its courts of justice, its validity and obli- "gation can not be impaired by any subseqent act of the "Legislature of the State or decision of its courts altering "the construction of the law."

In the leading case of Gelpcke vs. City of Dubuque, 1 Wallace, 175, Mr. Justice Swayne, delivering the opinion of

the Court, says, after quoting the law as above stated from the 16th Howard: "The same principle applies where there is "a change of judicial decisions as to the constitutional power "of the Legislature to enact the law. To this rule thus "enlarged we adhere. It is the law of this Court. It rests "upon the plainest principles of justice. To hold otherwise "would be as unjust as to hold that rights acquired under a "statute may be lost by its repeal. The rule embraces this "case."

Rowan vs. Runnels, 5 Howard, 138.
Havemeyer vs. Iowa County, 3 Wallace, 294.
Thompson vs. Lee County, 3 Wallace, 331.
Larned vs. Burlington, 4 Wallace, 275.
City of Kenosha vs. Lamson, 9 Wallace, 477.

In the case of Olcott vs. the Supervisors, 16 Wallace, 678, Mr. Justice Strong, in delivering the opinion of the Court, says: "Parties have a right to contract, and they do contract, "in view of the law as declared to them when their engage- "ments are formed. Nothing can justify us in holding them "to any other rule"

In the case of Hills vs. Jacks, 55 New York, 421, the Court says: "The plaintiff had a right to repose upon the "decision of the highest judicial tribunal in the land. It "was, as applied to the rules between the parties, the letter "and not the mere evidence of the law."

It is said by Kent, 1 Commentaries, 476, "If a decision "has been made upon solemn argument and mature delibera-

"tion, the presumption is in favor of its correctness, and the "community have a right to regard it as a just declaration, "and to regulate their actions and contracts by it."

In this case the facts stand thus: The law as settled by every court in the United States, when this charter was presented to the parties who became its stockholders, was, that if they should accept the charter and advance their money to construct the road upon the faith of the agreement contained in the charter on the part of the Territory or the State, that charter should constitute a contract which could not be impaired without their consent. If it shall now be held, after these parties have parted with their money, that this charter does not contain such a contract, surely they will have a right to say that they have been deceived and misled, and have invested their money as they never would have done but for the guaranty which was given them in the repeated and uniform decisions of the highest judicial tribunals. The only apology I can make to the Court for citing so many authorities in support of propositions of law which may now be considered axiomatic, is that, in this case, these propositions are denied, or, if not wholly denied, are sought to be limited in their application in such manner as to amount practically to a denial of the propositions themselves.

The inquiry thus far has been limited to the single question: Did the passage of the several charters of the plaintiff in error, the organization of the company in pursuance thereof, and the construction of the railroads authorized thereby, make a contract between the Territory of Minnesota and the

State of Minnesota on the one part and the railroad company on the other part, which can not be impaired by a law of the State of Minnesota, but which is under the protection of the Constitution of the United States? Assuming that such a contract exists, I now propose to discuss the question: What are the terms of this contract? The statutes under which this company was organized are as follows:

First.—An act to incorporate the Transit Railroad Company, passed by the Legislative Assembly of the Territory of Minnesota, March 3, 1855.

Second.—An act of the Legislature of Minnesota to execute the trust created by act of Congress in granting lands to the Transit Railroad Company, approved March 22, 1857.

Third.—An act to facilitate the construction of a railroad westerly by way of St. Peter, passed by the Legislature of the State of Minnesota, March 10, 1862, and by which act the Winona and St. Peter Railroad Company became the successor of the Transit Railroad Company and invested with all the franchises, rights and property of said Transit Railroad Company.

Fourth.—An act to amend an act to facilitate the construction of a railroad westerly by way of St. Peter, approved February 28, 1866.

I make the following quotations from the charter of the Transit Railroad Company:

"SECTION 2. The said corporation is hereby authorized "and empowered, and it is hereby declared that the objects

"and purposes thereof are to survey, locate, construct, com-
"plete, maintain, use and operate, at their pleasure to alter
"the line thereof, without changing the eastern terminus, a
"railroad, with one or more tracks or lines of rails, from
"Winona to St. Paul," etc.

"SECTION 6. The corporators named in the first section
"of this act shall meet at Winona on the first Monday of
"May next, to determine whether they will accept or reject
"this charter. If they shall determine to accept this charter,
"they shall appoint three or more agents or commissioners
"to receive subscriptions," etc.

"SECTION 7. Twelve directors shall be elected from among
"the stockholders, seven of whom shall form a quorum for
"the transaction of business; and all the affairs and the busi-
"ness of said company shall be conducted by or under the
"direction of the Board of Directors; and they are author-
"ized, for the purposes specified in this act, to make and
"establish regulations and by-laws, and to do all things ne-
"cessary to be done not inconsistent with the Constitution and
"laws of the United States, or the laws of this Territory, or
"of this act."

"SECTION 15. This act is hereby declared to be a public
"act, and may be amended by any subsequent legislative
"assembly in any manner not destroying or impairing the
"vested rights of said corporation."

The following quotations are from the act passed by the Territorial Legislature, March 22, 1857, to execute the trust

created by act of Congress and granting lands to the Transit Railroad Company. There are three chapters in this act, and it applies to four distinct railroad companies. By chapter first, the Minnesota Pacific Railroad Company was chartered and its powers defined; and in section 7 of that chapter, it was provided as follows:

"The Board of Directors shall have power to establish such "rates of toll and charges for the conveyance of persons "and property upon its said railroad as they shall, from time "time, direct and determine, and to change the same and to "levy and collect the same for the use of the said company;" and by that chapter, a portion of the lands were granted to that company.

By chapter three, the Root River Valley and Southern Minnesota Railroad Company and the Minneapolis and Cedar Valley Railroad Company were each granted a portion of said lands, and the franchises and powers of each of said companies were defined.

The 17th, 19th and 20th sections of the third chapter of the act are applicable to all the roads named in the different chapters.

The first section of the second chapter is as follows:

"The Transit Railroad Company is hereby authorized and "empowered to survey, locate, construct, complete and per- "petually to have, use, maintain and operate the Transit "Railroad, with one or more tracks or lines, from the City of

"Winona, on the most direct and feasible route, by way of "St. Peter to the Big Sioux River, south of 45th parallel of "north latitude, and shall have, possess, exercise and enjoy "the same rights, privileges, functions, franchises, authorities "and immunities (with reference to the said railroad to be "built thereon;) and there is hereby conferred upon the "Transit Railroad Company all the power and authority "contained in the charter of said company, passed by the "Legislative Assembly of the Territory of Minnesota, entitled "'An act to incorporate the Transit Railroad Company,' ap- "proved March 3, 1855, for the purpose of carrying out "the objects of this act, and for appropriating and applying "the lands hereinafter in this act granted, or their proceeds, "to aid in the construction of railroads by this act authorized "to be built."

The eighth section of this chapter is as follows:

"The Root River Valley and Southern Minnesota Railroad "Company shall have, at all times, the right to send passen- "gers and freight over the Transit Railroad at as low rates "and charges per mile as the said Transit Railroad Company "may charge over any portion of their said road."

After the passage of the foregoing acts, the Transit Railroad Company was organized, and executed and delivered to the State of Minnesota a deed of trust upon all its property and franchises to secure the bonds issued by the State in the manner specified in the act; and afterwards, such proceedings were had under the provisions of said deed of trust that the

State became possessed of all the property and franchises of said road, under legislation, however, which provided against any surrender or merger of the franchise.

The following quotations are from the act of March 10, 1862, passed by the Legislature of the State of Minnesota. By section first, the charter of the Transit Railroad Company was transferred to William Lamb and others, by the name and style of the Winona and St. Peter Railroad Company, and said company was invested with the right to enter upon, use and enjoy, all and singular, the road, property, franchises and immunities heretofore possessed by the grant to the Transit Railroad Company by the act of March 3, 1855, and the act of May 23, 1857, and all other acts granting privileges to the said company.

Section 10 of said act is as follows: "The Winona and St. "Peter Railroad shall transport by all regular trains, all "passengers and freight delivered to the same by any con- "necting line of railroad, now or hereafter to be constructed, "on the same terms and at no greater rates than for the time "being shall be charged by said Winona and St. Peter Railroad "for the same service to persons living on the line of said "road; provided, that any such connecting line shall be "governed by the same rules in transporting passengers and "freight on their several lines delivered by said Winona and "St. Peter Railroad Company."

On the 28th day of February, 1866, an act was passed extending the time for the completion of the construction of the road until the first day of January, 1864, which contains

this proviso: "Provided, that said company shall be bound "to carry freight and passengers upon reasonable terms." On the 3d of March, 1871, an act was passed granting a further extension of time to the Winona and St. Peter Railroad Company to complete its line of railroad. A part of the second section of said act reads as follows: "The said rail-"road shall transport freight from any and all stations on its "line to said several points of junction or crossing, and shall "also receive freight from said railroads at the several points "of junction or crossing therewith for transportation, and "transport the same to said stations at rates not exceeding "the lowest local rates charged and collected on any portion "of its line of railroad for corresponding distances for freight "of the same classification or kind, which said rates shall not "exceed the lowest average local rates on railroads of this "State for the same distances, and shall also transport the "cars of said connecting railroads over its railroad and allow "for mileage on the same the rates allowed by common usage "for exchange of car service from time to time, and shall "afford all usual facilities accorded by railroads interchanging "business; and no discrimination or preference shall be made "in favor of or against any locality, person, or either of said "connecting railroads; provided, that said Winona and St. "Peter Railroad shall have and enjoy the same privileges "hereinbefore granted in this section over and upon the rail-"roads of other railroad companies connecting with it as "are hereby granted to said companies, and that the provisions "of this section, so far as they are applicable, shall be mutual "and reciprocal between said Winona and St. Peter Railroad "and each of said connecting railroads."

Section 4 of article 10 of the Constitution of the State of Minnesota is as follows: "Lands may be taken for public "way for the purpose of granting to any corporation the "franchise of way for public use. In all cases, however, a "fair and equitable compensation shall be paid for such lands "and the damages arising from the taking of the same; but "all corporations being common carriers, enjoying the right "of way in pursuance of the provisions of this section, shall "be bound to carry the mineral, agricultural, and other pro- "ductions or manufactures on equal and reasonable terms."

The foregoing I believe to be substantially all the provisions of the law necessary to be considered in determining what were the terms of the contract between the Territory and the State of Minnesota and the Winona and St. Peter Railroad Company. Before I proceed to comment upon these different statutes, I wish to say a few words in relation to the rule of construction to be applied to these charters.

It is insisted by the learned counsel for the defendant in error that these grants are to be construed with the utmost strictness against the grantees, and that, therefore, the corporation has no power to do any thing which is not expressed in the aptest possible words in the charter. His argument goes to the extent of insisting that the words used in the charters must be construed in the strongest manner possible against the company, and that the object of considering the terms of the charter is not to ascertain the intention of the parties in granting and accepting the charter, but to devise the mode of giving the words used the strongest possible

construction against the grantee, regardless of the question of what the parties meant to express by the use of these words, and that the right of the company to fix reasonable and equal rates of compensation for the transportation of passengers and freight can not be granted by any implication, however necessary it may be to the enjoyment of the rights expressly granted. In respect to this proposition, I desire to make the following statement of the rule of law applicable to this question, as I understand it:

First.—Grants, whether public or private, are to be construed in such manner as to give effect to the intention of the parties in making and accepting the grant, if that intention may be fairly arrived at from a consideration of the words used.

Second.—There is included in every grant made by the sovereign power the right to the beneficial use of the thing granted; and the right to receive compensation for personal services and the use of the property granted is always necessarily implied in the grant whenever such compensation is an incident of the thing granted.

Third.—The rule of construction of a grant where it is made *ex gratia*, without any consideration being paid therefor by the grantee, is different from the rule of construction of a grant for which the grantee pays a full and valuable consideration.

Fourth.—Whenever a grant of a franchise is made for an adequate consideration paid by the grantee, no rule of

construction can justly be applied to the grant which deprives the grantee of the means of enjoying it, and takes from him the consideration which he has paid, without allowing him any benefit whatever from the grant.

In the Binghampton Bridge case, 3 Wallace, 51, the Court says: "All contracts are to be construed to accomplish "the intention of the parties; and in determining their dif- "ferent provisions, a liberal and fair construction will be given "to the words, either singly or in connection with the subject "matter. It is not the duty of a Court, by legal subtlety, to "overthrow a contract, but rather to uphold it and give it "effect; but no strained or artificial construction is to be "applied to any part of it. If there is no ambiguity, and the "meaning of the parties can be clearly ascertained, effect is "to be given to the instrument used, whether it is a legislative "grant or not."

I refer the Court to the case of The State vs. Noyes, 47 Maine Reports, p. 189, where the whole question is thoroughly discussed:

"In construing grants, the words used must be taken in "the sense in which the common usage of mankind has ap- "plied them, as well in reference to the context in which "they are found as the circumstances in which they are used."

Lord vs. The Sidney City Commissioners, 12 Moore, P. C. C., 473.

"It is a settled principle of law that, not only as between

"the Crown and the subject, but also as between subject and "subject, the reservation of a right implies the means of "enjoying it."

The Great Western Deep Coal Company, 12 L. T. [N. S.], 842.

Earl of Cardigan vs. Armitage, 2 Barn. & Cres, 212.

"The law allowing the grant gives, by implication, the "grantee the necessary means of attaining the benefit of it."

8 Bacon's Abridgment, Title Prerogative F.

The rule is thus laid down in Chitty on Prerogatives, chapter 16, section 3, p. 391: "In ordinary cases between subject "and subject, the principle is that the grant should be con- "strued, if the *meaning* be *doubtful*, most strongly against the "grantor, who is presumed to use the most cautious words for "his own advantage and security; but in the case of the "King, whose grants generally flow from his royal grace and "bounty, the rule is otherwise, and crown grants have at all "times been construed most favorably for the King where a "*fair doubt* exists as to the *real meaning* of the *instrument*." But there are exceptions and limitations even to this rule, as follows:

"*First.*—No strained or extravagant construction is to be "made in favor of the King. If the intention be obvious, "royal grants are to receive a fair and liberal interpretation."

"*Third.*—If the King's grants are upon a valuable consid- "eration, they shall be construed *strictly* for the patentee."

Every thing which is incidental to the enjoyment of the thing granted is, by necessary implication, embraced in the grant. The right to the beneficial use of the thing granted and the right to receive compensation for services and the use of property is always necessarily implied in the grant whenever such compensation is an incident of the thing granted. The charter of this corporation for the purpose of its becoming a common carrier involves the right to receive such compensation as is incident to the business of a common carrier for hire—that is, a reasonable compensation. Where the right to receive compensation is not incident to the franchise which is granted, such right does not exist unless granted in express words. Such are grants by the King of a franchise to keep a fair or market. This distinction plainly appears, I think, in all the cases upon this subject. It is stated very clearly in the case of the Corporation of Stamford vs. Paulet, 1 Crompton & Jervis Reports, p. 57. I think this case fully sustains the distinction I am attempting to make between the grant of a franchise to which the right to receive compensation is not a necessary incident and the grant of a franchise which would be valueless and inoperative without it. What was the object of this incorporation, and for what purpose were the stockholders invited to spend their money? It is beyond controversy that this company was incorporated for the sole purpose of being a common carrier for hire. If the question was now before this Court whether this company, organized and operating its road under its charter, was *ipso facto* a common carrier for hire, and subject to the strict rules of law which govern common carriers for hire, this Court would not hear the question discussed. The

fact is apparent, plain and palpable. The case stands before the Court, so far as this question is concerned, precisely as it would stand if the words used in the charter had been these: "The business of said company shall be that of a common "carrier of persons and property for hire; and at a meeting "of the directors, seven shall constitute a quorum for the "transaction of business; and they are authorized for the "purpose specified in the act to make and establish regula- "tions and by-laws, and to do the things necessary to be "done in conducting the business of the company."

I think it must be conceded that it would be utterly absurd to say that this charter did not give the right to the company to receive compensation for the transportation of persons and property. That the corporators were invited to spend so vast a sum of money in the construction and operation of a railroad, and were bound by the act itself to transport the persons and property of all citizens over its road at the risk of the company, without the right to receive any compensation therefor, is too monstrous a proposition to be discussed, and yet it appears to me that this is the position insisted upon by the learned counsel for the defendant in error. For, if the charter did grant the right to the company to receive compensation for its services, and the Legislature did not in the charter fix the amount of such compensation, nor reserve the right to do so, but did say in express words that the directors of the company should have the right to make regulations and by-laws, and do all things necessary to be done in transacting the business of the company, then it did give the directors the power to fix the amount of the compensation which the charter

authorized them to receive. Or, in other words, if the charter did confer the right upon the company to transport persons and property for compensation, then one of the things necessary to be done in the regulation of that business was, to fix the amount of the compensation to be charged; and this the Board of Directors were authorized to do in express words.

I respectfully submit that the only answer to this proposition is the averment that it was not the design or the effect of the charter that the company should have the right to charge any compensation for the services rendered by it; or, in other words, that it did not become, under its charter, a common carrier for hire.

Referring to the language used in the charter of the Transit Railroad Company, of March 3, 1855, what does it authorize the Board of Directors to do? "To make and establish "all by-laws and regulations, and to do all things necessary "to be done to carry out the provisions of the act"—that is, to survey, locate, construct, complete, maintain, use and operate the railroad therein specified. Each separate act which they may do is not specified in detail, but they are to do all things necessary to construct, use and operate the railway. One of the things necessary to be done to use and operate this railroad is, to fix the rate of transportation for persons or property transported thereon. This is not only apparent, but it is conceded—the question between us being, not whether such rates of transportation must necessarily be fixed, but whether the Legislature or the Company shall fix them. It is agreed, on all hands, that it must be done by some one. Is

it not perfectly apparent that, if the fixing of the rates of compensation for the transportation of persons and property was one of the things necessary to be done in using and operating this railroad, then express authority was given in the charter to the Board of Directors to fix and establish these rates? The only answer that it is possible to give to the proposition that the Board of Directors were so authorized by the charter to make regulations to govern the rates of fare and freight upon the road is, the allegation that it was not necessary for such regulations to be made by any one, in order that the road should be used and operated in the manner contemplated in the charter, which would be a statement that I do not deem it necessary to discuss.

The decision of the Supreme Court of Minnesota concedes that it was contemplated by the act of incorporation, and became a part of the contract between the Territory and the Company, that the Company should have the right to collect *some* rate of fare and freight upon its road. If this be true, it follows, necessarily, that fixing the rate of fare and freight was one of the things necessary to be done, and one of the regulations necessary to be made, in operating the road in the manner contemplated by the charter, and consequently brings it within the express power granted to the Board of Directors.

Unless the new act incorporating the Transit Railroad Company contemplated that the road should be used and operated without any compensation being paid for the transportation of persons or property thereon, then, in using and operating

such road, one of the things necessary to be done was to fix such rate for transportation, and that the Board of Directors was expressly empowered to do.

But let us consider for a moment all the words of the charter. In the language used by the Court in the Binghampton Bridge case, a fair construction must be given to the words in connection with the subject matter. The whole charter should be construed together. It will be seen, by reference to the provisions above quoted, that this Company is, by express words, authorized to charge the same compensation upon freight which it is required to receive from connecting lines that it charges on freight received on its own line; and it is impossible to say that it can derive any benefit from that authority if it was not authorized to charge compensation upon its own lines. But let us look at it in another view. It is perfectly clear that one of the roads mentioned in the law of the Territory of Minnesota, entitled "An act to execute the "trust created by act of Congress, and granting lands to the "Transit Railroad Company, approved March 22, 1857," was authorized, by the express words of its charter, "to "establish such rates of toll and charges for the conveyance "of persons and property, upon its said railroad, as the "Board of Directors should from time to time direct and de-"termine, and to change the same, and to levy and collect "the same for the use of said company."

Is this statute to receive such a construction by this Court, that one of these roads—to wit, the Minnesota and Pacific Railroad—is to be allowed to fix its own rates of fare and freight,

and to charge these rates upon all freight received from the Winona and St. Peter Railroad, and in its cars, while the Winona and St. Peter Railroad Company is required by the law to receive business from the Minnesota and Pacific Railroad Company at lesser rates, to be fixed by the Legislature? This is the necessary result of the construction which is contended for by counsel for defendant in error. For, if the words used in the Minnesota and Pacific Railroad charter do give to that company the right to fix its own rates, and the words in the Transit Railroad Company's charter, contained in the same act, do not give this power, it must have been the intention of the Legislature not only to prescribe one rule for one road and another for another, but to require the roads to receive business from each other, upon terms wholly unequal.

I now desire to call the attention of the Court to the language used in the various statutes and in the Constitution of the State of Minnesota. A consideration of the various provisions of the different charters leads irresistibly to the conclusion that the Legislature did intend to grant to the company the right to fix its rates of fare and freight. By section 8 of the act of March 22, 1857, above cited, the right of the Transit Railroad Company to fix its rates of fare and freight is expressly recognized, and a proviso inserted that it shall not charge a greater rate of fare and freight for business received from the Root River Valley and Southern Minnesota Railroad Company than it charges upon business originating upon its own line, which is an absurdity, unless it had a right to charge rates of fare and freight upon business originating upon its own road.

The whole section is unnecessary and irrelevant, if the Legislature had the right to fix the rates of fare and freight over each of those roads. The same remark will apply to section 10 of the act of March 10, 1862. These provisions in the charter, accepted by the company, form a part of the contract, and that contract is, that the company shall have the right to charge reasonable rates of fare and freight upon its road, not discriminating against freight received from the other roads.

What was the effect of the proviso in the act of February 28th, 1866, in these words: "Provided that said company "shall be bound to carry freight and passengers upon reason- "able terms."

This may be considered in connection with the provision of the Constitution of that State, that "all corporations, being "common carriers, enjoying the right of way in pursuance "of the provisions of this section, shall be bound to carry "the mineral, agricultural and other productions and manu- "factures, on equal and reasonable terms." There is no doubt that here are express words defining the nature of the contract. The contract is, that this road shall carry freight and passengers as a common carrier, for hire, upon equal and reasonable terms. The question arises, whether one party to the contract can declare what equal and reasonable terms are; or whether, in case of a division of opinion between the parties upon this question, it is a judicial question to be determined by the courts, both parties having a right to be heard. It is assumed that this contract may be construed by the

Legislature, and that it may determine what are just and reasonable terms, without any right being given to the company to be heard upon that question, and that, if the terms so fixed by the Legislature are unremunerative, the company may be deprived of its property without ever having an opportunity to be heard in the courts: unless this proposition can be maintained, it follows, necessarily, that the judgment of the Court can not be sustained. Without any statute fixing the rates of fare and freight, if a suit had been brought against this railroad company upon this contract, the party alleging the default on the part of the company must aver and prove that the rates charged were not equal, or that they were not reasonable. That was precisely the legal right of this company when this statute was passed. Can the Legislature, by an act of its own, change the legal right of the company in that regard?

I insist that the determination of what is a reasonable compensation for the personal services of the agents of this company, the use of the property of the company, the risk which, as common carrier, it assumes as an insurer of the property intrusted to it, is a judicial question. This point was the sole point in the case of the Philadelphia, Wilmington & Baltimore Railroad Company vs. Bowers, decided by the Court of Errors and Appeals of the State of Delaware, June term, 1873, reported in the March number [1874] of the *Register:*

"The Attorney General, who appeared on behalf of the "State, put, in the strongest possible form, the argument in

"support of this act as an exercise of internal regulation, by "insisting that there must at all times inhere in the Legisla- "ture an authority to protect the public against extortionate "charges and unjust discriminations by carriers exercising a "public employment, and that to this power railroad corpora- "tions, as well as other common carriers, must be held amen- "able. That the Legislature possesses the general power "here claimed for it is not doubted; but the real question "still remains, viz., in what mode may such power be consti- "tutionally exercised,—at least over corporations? The "answer is, that the Legislature may, by general laws, forbid "extortion and unjust discriminations on the part of common "carriers, as it may prohibit any other offense against social "order or the general welfare. It was not disputed in the "argument that, for the breach of such laws, corporations as "well as natural persons may be held liable; but such liability "would be enforced by a judicial proceeding, in which the "alleged or extortionate or unjustly discriminating character "of the charges drawn into question would be judicially "ascertained. Such remedies against common carriers already "exist at the common law, and to these, as well as to the "common law liabilities of common carriers generally, incor- "porated carriers as well as natural persons are subject by the "public nature of their employment. Very different, however, "from such a mode of regulation by general laws, with a liabil- "ity to judicial remedies, is the attempt by a Legislature to "prescribe in advance a tariff of charges for carriers—to do "which is in effect to take out of their hands the management "of their own business. This certainly can not be done in "the case of a corporation. How far the Legislature can

"directly regulate charges by common carriers not incorporated "is a question not now arising; but the right of a corporation "to conduct its own business—to adjust its tariff of charges "(subject to the implied condition that such charges shall not "be unreasonable) stands upon a special ground not applica- "ble to an unincorporated carrier. For such right, being "a part of the corporate franchise granted by charter, is pro- "tected by the Constitution of the United States."

The case of the Commonwealth vs. Proprietors of New Bedford Bridge, 2 Gray, 339, is also in point:

"3. But the main ground on which the Commonwealth re- "lies to sustain the present indictment is, the failure of the "defendants to comply with the provisions of St. 1851, c. 318, "by which they are required to construct and maintain, in "their bridge across the channel of the river, a draw of not "less than sixty feet in width. The defendants admit that "they have not constructed a draw in compliance with this "legislative requirement, and rest their defence to this part "of the case on the unconstitutionality and invalidity of the "act by which this duty is imposed upon them To determine "this question it is necessary to recur to the original act in- "corporating the defendants, St. 1796, c. 19. There can be "no doubt as to the legal relations created by this act between "the Government and the defendant corporation. On the part "of the former it was a grant in consideration of the expected "benefit to the public, of the right to construct and maintain "a bridge over navigable waters, to be built in the place and "mode, and of the size and materials specified in the act; on

"the part of the latter, it was a stipulation in consideration "of the right to take the toll by the act created and estab- "lished, to erect and support a bridge across the river, according "to the terms and conditions, and of the kind and dimensions "in the act set forth and described. Upon familiar and well "settled principles, the act, when accepted by the defendants, "was an executed contract between them and the Government, "by the terms of which, as contained in the charter, both "parties are equally bound. The defendants can not, without "the consent of the Legislature, escape or evade any of the "duties or obligations imposed upon or assumed by them "under the act; nor can the Legislature, without the assent "of the defendants, in any way affect or impair the original "terms of the charter, by annexing new conditions or impos- "ing additional duties, onerous in their nature, or inconsistent "with a reasonable construction of the compact. Angell & "Ames on Corp., §§ 31, 82, 767, and cases cited. Wales vs. "Stetson, 2 Mass., 146; Nichols vs. Bertram, 3 Pick., 342. "Boston and Lowell Railroad vs. Salem and Lowell Railroad, "*ante*, 30.

"4. We are brought directly to the question whether the "defendants are bound to comply with the provisions of St. "1851, c. 318, by which they are required to erect and main- "tain a new draw in their bridge across the channel of the "river, to be built of the size and in the manner therein "specified; and are liable to indictment solely for a neglect "and refusal to carry its requisitions into effect. Applying "to the original charter of the defendants, as we are bound to "do, the ordinary rules regulating the interpretation and con-

"struction of contracts, it will be found that the extent of the "duty imposed on them, respecting the erection and construc- "tion of the draws over the channel of the river, is clearly set "out and defined. They are to erect 'suitable draws, which "shall be at least thirty feet wide,' that is, the minimum width "of the draws is prescribed. In all other respects—in their "construction, materials, dimensions and operation—they are "to be adapted to the locality in which they are to be erected, "and to the wants and necessities of those who may have oc- "casion from time to time to use them for the purpose of nav- "igating the river above and below the bridge. The corpora- "tion could not legally make either draw less than thirty feet "wide; they were not bound to make it of greater width, "unless the convenience and accommodation of the public, "having occasion to pass the bridge or navigate the river, "rendered its enlargement proper and necessary. These "were the terms and conditions prescribed by the "Legislature on the subject of the erection and main- "tenance of the draws over the channel, upon the "faith of which the defendants accepted the charter, "assumed the duties imposed by it on them, and ex- "pended their money in the construction of the bridge. No "power to amend or change the charter was reserved to the "Legislature. The respective rights and duties of the parties "to the contract must therefore be determined solely by its "original provisions. Tried by this test, there can be no "doubt that the St. of 1851, c. 318, imposes new and addi- "tional burdens on the defendants not contemplated by their "act of incorporation. It raises the minimum width pre- "scribed for the draw over the channel from thirty to sixty

"feet; it requires the defendants to make and maintain "a new draw in lieu of the one then existing, to be not less "than sixty feet in width; and to remove the westerly abutment "thereof, to a point eight feet further to the eastward, than "the westerly abutment of the existing draw; and directs "that this draw shall be constructed within six months from "from the passage of the act, in such manner as shall be ap- "proved by a commissioner to be appointed for the purpose "by the governor, the expense of such commissioner to be "paid by the corporation. It certainly requires no argument to "prove that these requirements are of an onerous character, "and that they materially change the nature of the structure "which the defendants were required to erect by their origi- "nal charter. Indeed, this is not denied by the learned coun- "sel for the Commonwealth. But, it is urged, and this con- "stitutes the stress of the argument on this part of the case, "that the use of the term 'suitable,' in the act incorporating "the defendants, as applied to the construction of the draws, "did not fix and absolutely settle the duty and obligation of "the defendant in this particular; that these, with the excep- "tion of the minimum width of the draw, were thereby left "open and undetermined, and by necessary implication the "Legislature have the right reserved to them of regu- "lating, from time to time, the construction of the draws, "and of prescribing what shall be suitable as respects "their location, materials and dimensions. But we can "not yield to the force of this argument. It is founded on "an entire misapprehension of the relations of the parties, "as created by the act of incorporation. They are but "parties to a contract. Each has equal rights and privileges

"under it, and neither can interpret its terms authoritatively "so as to control and bind the rights of the other. The "Commonwealth has no more power or authority to construe "the charter than the corporation. By becoming a party to "a contract with its citizens, the Government divests itself of "its sovereignty with respect to the terms and conditions of "the compact, and its construction and interpretation, and "stands in the same position as a private individual. If it "were otherwise, the rights of parties contracting with the "Government would be held at the caprice of the sovereign "and exposed to all the risks arising from the corrupt or ill-"judged use of misguided power. The interpretation and "construction of contracts, when drawn in question between "the parties, belongs exclusively to the judicial department of "the Government. The Legislature have no more power to "construe their own contracts with their citizens, than those "which individuals make with each other. They can do "neither without exercising judicial power, which would be "contrary to the elementary principles of our Government, as "set forth in the Declaration of Rights, Art. 30. No better "illustration of the dangerous consequences which would fol-"low from a different doctrine could be had than is afforded by "the case at bar. If the Legislature have the power to decide "upon the true meaning of the terms of the contract, and to "determine what shall be deemed suitable in the construction "of the bridge and draws, there can be no limit placed upon "the exercise of this power. If they have the right to pre-"scribe a draw of sixty feet in width, they may hereafter re-"quire the defendants to extend it to one hundred feet, or to "build it across the entire space between the shore and the

"adjacent island. So, too, in regard to the construction of "the bridge itself. The act of incorporation required that it "should be well built, at least twenty-four feet wide, of good "and suitable materials. By parity of reasoning it would be "competent for the Legislature to enact that the bridge should "be rebuilt one hundred feet in width and be constructed of "iron. In a word, the argument leads directly to the conclu- "sion that the Legislature have the power to annex new and "onerous conditions to the contract, at their pleasure, and "thus effectually destroy the value of the franchise granted to "the defendants. Such a doctrine can not be maintained "without overthrowing all the salutary and well established "principles applicable to this species of contract between the "Government and its citizens. For these reasons we are of "opinion that the act of 1851, c. 318, *ex proprio vigore*, has "no binding force upon the defendants, and that this indict- "ment can not be sustained against them upon proof of a neglect "and refusal to comply with its requisitions."

This point was also decided in the case of the Chicago and and Alton Railroad Company vs. the People of the State of Illinois, September Term, 1873, not yet reported.

The same point was decided in the same manner in the case of the State vs. Noyes, 47 Maine, 189.

If the Legislature has a right, under the contract contained in this charter, to say absolutely what are just and reasonable rates of compensation, it has an uncontrolled power over the property of this corporation, and may compel it, under heavy pains and penalties, to use its property for the benefit

of the public without compensation. If the Legislature had enacted that the railroad company should transport the property in question in this suit from Winona to Rochester for one cent, would the act be valid, and, if not, why not? If the Legislature have the power to say what is a just compensation, the question is one of power. If the Legislature has the right to fix the rates at all, they have the right to fix unremunerative rates, and the party is deprived of its property without due process of law. It will not be contended that the constitutionality of this act depends upon a fact which may be tried before a jury, to-wit: the fact whether the rates fixed by the Legislature are remunerative or not, or reasonable or not. The sufficient answer to the whole proposition is, the right to the beneficial use of property is in itself property; and this company under the 14th article of the Constitution, can not be deprived of its property without due process of law, and an act of the Legislature is not such due process of law.

The State, having contracted with the appellant that it might charge and receive reasonable rates of compensation for the transportation of appellee's property, can not impose the heavy penalty claimed in this case upon appellant for collecting a charge of one dollar upon this package, unless one dollar was more than a reasonable rate—a fact which can only be judicially determined, and has not been so determined in this case.

This law is, in effect, a taking of property by the Legislature. I quote from the opinion of the Court in Eaton vs. Boston, Concord and Montreal Railroad, 51 N. H., 504:

"To constitute a 'taking of property' it seems to have "sometimes been held necessary that there should be an 'ex- "clusive appropriation,' a 'total assumption of possession,' a "'complete ouster,' an 'absolute or total conversion of the "entire property,' a 'taking the property altogether.' These "views seem to us to be founded on a misconception of the "meaning of the term 'property,' as used in the various "State constitutions.

"In a strict legal sense, land is not 'property,' but the "subject of property. The term 'property,' although in "common parlance frequently applied to a tract of land or a "chattle, in its legal signification, 'means only the rights of "the owner in relation to it.' 'It denotes a right * * * "over a determinate thing.' 'Property is the right of any "person to possess, use, enjoy and dispose of a thing.' SEL- "DEN, J., in Wynehamer vs. The People, 13 N. Y., 378, 433; "1 Blackstone's Com. 138; 2 Austin on Jurisprudence [3d "ed.] 817, 818.

"If property in land consists in certain essential rights, and "a physical interference with the land substantially subverts "one of those rights, such interference 'takes' *pro tanto*, the "owner's 'property.' The right of indefinite user (or of "using indefinitely) is an essential quality or attribute of ab- "solute property, without which absolute property can have "no legal existence. 'Use is the real side of property.' This "right of user necessarily includes the right and power of "excluding others from using the land. See 2 Austin on Ju- "risprudence [3d ed.] 836; WELLS, J., in Walker vs. O. C. "W. R. R, 103 Mass., 10, 14.

"From the very nature of these rights of user and of ex-
"clusion, it is evident that they can not be materially abridged
"without, *ipso facto*, taking the owner's 'property.' If the
"right of indefinite user is an essential element of absolute
"property, or complete ownership, whatever physical inter-
"ference annuls this right takes 'property,' although the
"owner may still have left to him valuable rights (in the
"article) of a more limited and circumscribed nature. He
"has not the same property that he formerly had. Then he
"had an unlimited right, now he has only a limited right.
"His absolute ownership has been reduced to a qualified own-
"ership. Restricting A's unlimited right of using one hun-
"dred acres of land to a limited right of using the same land,
"may work a far greater injury to A than to take from him
"the title in fee simple to one acre, leaving him the unre-
"stricted right of using the remaining ninety-nine acres.
"Nobody doubts that the latter transaction would constitute a
"'taking of property.' Why not the former?

"If, on the other hand, the land itself be regarded as
"'property,' the practical result is the same. The purpose
"of this constitutional prohibition can not be ignored in its
"interpretation. The framers of the Constitution intended
"to protect rights which are worth protecting; not mere
"empty titles, or barren insignia of ownership, which are of
"no substantial value. If the land, 'in its corporeal substance
"and utility,' is 'property,' still, all that makes this property
"of any value is the aggregation of rights or qualities which
"the law annexes as incidents to the ownership of it. The
"constitutional prohibition must have been intended to protect

"all the essential elements of ownership which make 'prop-
"erty' valuable. Among these elements is, fundamentally,
"the right of user, including, of course, the corresponding
"right of excluding others from the use. See COMSTOCK, J.,
"in Wynehamer vs. The People, 13 N. Y., 378, 396. A
"physicial interference with the land, which substantially
"abridges this right, takes the owner's 'property' to just so
"great an extent as he is thereby deprived of his right. 'To
"deprive one of the use of his land is depriving him of his
"land,' for, as Lord Coke said, 'What is the land but the
"profits thereof?' SUTHERLAND, J., in People vs. Kerr, 37
"Barb., 257, 399; Co. Litt., 4 *ib.* The private injury is
"thereby as completely effected as if the land itself were
"'physically taken away.'

"The principle must be the same whether the owner is
"wholly deprived of the use of his land or only partially de-
"prived of it, although the amount or value of the property
"taken in the two instances may widely differ. If the rail-
"road corporation take a strip of four rods wide out of a farm
"to build their track upon, they can not escape paying for
"the strip by the plea that they have not taken the whole
"farm. So a partial, but substantial, restriction of the right
"of user may not annihilate all the owner's rights of property
"in the land, but it is none the less true that a part of his
"property taken. Taking a part 'is as much forbidden by the
"Constitution as taking the whole. The difference is only one
"of degree; the quantum of interest may vary, but the principle
"is the same.' See Am. Law Review, 197, 193; LAWRENCE, J.,
"in Nevins vs. City of Peoria, 41 Ill., 502,511."

The case of Pumpelly vs. the Green Bay Company, 13 Wallace, 177, announces the same doctrine. I quote as follows:

"It would be a very curious and unsatisfactory result, if, "in construing a provision of constitutional law, always under- "stood to have been adopted for protection and security to "the rights of the individual as against the Government, and "which has received the commendation of jurists, statesmen "and commentators, as placing the just principles of the com- "mon law on that subject beyond the power of ordinary leg- "islation to change or control them, it shall be held that, if "the Government refrains from the absolute conversion of real "property to the uses of the public, it can destroy its value "entirely; can inflict irreparable and permanent injury to "any extent; can, in effect, subject it to total destruction, "without making any compensation, because, in the narrowest "sense of that word, it is not *taken* for the public use. Such "a construction would pervert the constitutional provision "into a restriction of the rights of the citizen, as those rights "stood at the common law, instead of the Government, and "make it an authority for an invasion of private right, under "the pretext of the public good, which had no warrant in the "laws or practices of our ancestors."

This proposition is abundantly sustained by other authority. Sinnickson vs. Johnson, 2 Harrison, New Jersey, 129; Cornell vs. Newburgh, 2 Johnson, Johnson's Reports, 162; Hooker vs. New Haven and Northampton Co., Conn., 146; Rowe vs. Granite Bridge Co., 21 Pickering, 334; Canal Supervisors vs. The People, 17 Wendell, 604; Lackland vs. The

North Missouri R. R. Co., 31 Mo., 180; Stevens vs. Middlesex Canal, 12 Mass., 426. The same rule has been abundantly maintained in the State of Wisconsin: Pratt vs. Brown, 3 Wis., 613; Walker vs. Shepardson, 4 Wis., 511; Fisher vs. Horicon Iron Co., 10 Wis., 353; Newell vs. Smith, 15 Wis., 104; Goodell vs. City of Milwaukee, 5 Wis., 39; Weeks vs. City of Milwaukee, 10 Wis., 242.

In the case of Howell vs. Bristol, 8th Bush, (Ky.) R. 499, the Court says: "When the consequence of a law is to pro-"duce the most oppressive inequality, to compel a small "minority to provide, at their own expense, an improvement "of public utility, it assumes the character of an attempted "exercise of arbitrary power over the property of the minority, "and becomes, in the constitutional sense, a taking and "appropriation of private property for the public use without "compensation, and it can not be sustained, so long as the "safeguards placed around the citizen can be constitutionally "exercised, by any department of our Government, and when "it is attempted, it is the imperative duty of the judiciary to "interfere in behalf of those whose constitutional rights are "being thereby prejudicially affected."

The question is not whether, in this case, fifty-seven cents is a just and reasonable compensation for the transportation of the two bales of cloth from Winona to Rochester, and one dollar an unreasonably high compensation for the service; but the real question is, does it impair this contract to deprive the company of the right to fix equal and reasonable rates of compensation for the use of its property and the personal

services of its agents, and for the risk it assumes, and to hold that the Legislature may fix arbitrary rates and compel the company to operate its road for such rates, whether compensatory or not? for it must be conceded that, if this power exist in the Legislature at all, it is unlimited and absolute. Nor will it do to say that the mere fact that the Legislature has fixed these rates must be taken as conclusive evidence that they are compensatory rates or just and reasonable rates. It may be that under this charter there is a duty resting upon the defendants to carry freight for equal and reasonable rates of compensation, and that the Legislature might provide suitable penalties for the infraction of this duty, but that is wholly a different question.

I wish to call the attention of the Court also to the act passed by the Territorial Legislature of Minnesota, May 22, 1857, "to execute the trust imposed by an act of Congress in "granting lands to aid in the construction of railroads." The first chapter applies to the Minnesota and Pacific Railroad Company, and gives it, in the broadest language, the right "to establish such rates of toll and charges for the convey- "ance of persons and property upon its line of railroad as it "should from time to time direct."

The second chapter relates to the Transit Railroad Company, and the first section provides that "the Transit Railroad "Company shall have, possess, exercise and enjoy *the same* "rights, privileges, functions, franchises, authority and im- "munities, (with reference to the said route of any railroad to "be built thereon.)"

To what do the words, "the same," in this section refer? I think the grammatical construction is that they refer to the "rights, privileges, functions, franchises and immunities" conferred upon the Minnesota and Pacific Railroad Company by the first chapter of the same act. If this clause does not have the meaning which is here suggested, certainly no meaning can be given to it; for neither in the first chapter of the act, nor in the first section of the second chapter is any reference made to any rights, immunities or franchises, except those conferred upon the Minnesota and Pacific Railroad Company by the first chapter of the act. There would seem to be great propriety in conferring the same rights and franchises upon each of the companies to whom land-grants were made by that act. I admit that the language of the section is not clear, but I think a careful reading of the section would demonstrate that no meaning can be attached to the clause quoted except it be the one I have given it.

It appears to me nothing can be plainer than that, under the Constitution and the law as it existed at the time when the Winona and St. Peter Railroad charter was passed by the State Legislature, a right was given, in express words, to the railroad company to charge reasonable rates of fare and freight. It is not contended in this suit that the rates charged by the company were unreasonable. If the suit is to be maintained it must be upon the theory that the contract between the State and the company was, that the company should charge only such rates as should be fixed by the Legislature, whether the same were reasonable or remunerative or not.

What does the grant to this company to have and use a railroad mean if the right to any beneficial use of it may be taken away at any time by the Legislature? The stockholders of this company would be gratified to know whether the words "to have and use a railroad," in the charter, have any meaning other than the right to run the cars for the public benefit at their own expense.

III.

The right to the unrestricted use of property is a necessary incident to its ownership. In so far as the right to use property is limited, to the same extent the ownership of the property is limited. If the corporation is the owner of its tracks and equipment, and is entitled to the services of the agents whom it employs, then the beneficial use of that property and of the services of those agents can not be taken from it or interfered with in any legal manner, only—

First.—In the exercise by the State of its power of eminent domain.

Second.—In the exercise by the State of its police power; or,

Third.—By virtue of some contract which the company itself has made.

It is hardly necessary to discuss the question whether the act in question in this suit is the exercise of a police power.

The slightest consideration of the nature of this police power will make it evident that it is not the power which is here claimed. Police power is the power to prohibit offences against social order or the general welfare, which perhaps may include the right to forbid extortion and unjust discrimination by railroad companies. Very different from such a mode of regulation by general laws, with a liability only to judicial remedies, is the attempt to prescribe in advance an arbitrary and inflexible tariff of charges, which is in effect to take from the companies the management of their own business, and to deprive them of the use of their own property, and to allow it to be managed not for the benefit of the owners in any sense, but for the benefit of the persons who use the property; not by persons skilled in its management, but by men having no knowledge upon the subject; not by persons desirous of promoting the interests of the owners of the property, but by persons whose interests are adverse; in effect, to determine that the value of the property shall be decreed in town meetings by men having no information on the subject upon which they thus absolutely determine, and upon which property interests so vast are based. "Police regulations must have reference to "the comfort and safety or welfare of society. They must "not be in conflict with the provisions of the charter. They "must not under pretense of regulation, take from the cor-"poration any of its essential rights. In short, they must be "police regulations in fact, and not amendments of the charter "in curtailment of the corporate franchise."

Thorpe vs. Rutland and Burlington Ry., 27 Vt., 140.
Cooley on Constitutional Limitations, 599.

That the State has the power over the property of this corporation that it has over the property of any other citizen of the State is not denied, nor is it in controversy in this suit. The right of taxation—the right to subject the property of this company to the ownership and use of the public upon the payment of a just compensation, in manner provided by law, is also not denied. But the ground upon which it is contended that the State has a right to determine absolutely whether the property of this company shall be used in such manner as to afford any remuneration to the company for its use or not, is placed upon the ground of a contract, and there is no pretense that the State has any right over the property of this company which it has not over the property of any other citizen of the State, unless such right grows out of a contract entered into between the State and the company. The iron with which this road was built before it was laid down upon the road, the cars and locomotives of the company which were purchased by it before they were placed upon this road, were all clearly the property of the company, over which the State had no control, except for police purposes and for the purpose of taxation. It is contended that the company lost the right to the exclusive use of its property when it placed it upon the railroad, for the reason that the property then became public property and ceased to be private estate. That I may state the proposition with the utmost fairness, I will do so in the language of one of the most distinguished gentlemen who has argued in its support: "Can the Legislature regulate the "tariff of rates to be charged upon the railroads of the State "for the transportation of passengers and freight? The "answer to this question depends upon the legal character of

"railroads and the relations which exist between the State "and railroad corporations, or, in other words, whether a "railroad is public property or mere private estate, and "whether these corporations are subjects of the State, amen- "able to its laws, or sovereignties independent of State con- "trol. If railroads are mere private estates, owned by the "corporations in absolute right, then they are no more "subject to legislative control than a farm or any other "private property. If, on the other hand, railroads are "public highways, then they are part of the public domain of "the State, farmed out for administration, but subject to the "control of the Legislature, like any other highway by land "or water; and, fortunately for the public, it is well settled "that railroads are public highways, and, as such, subject to "legislative control;" and he quotes State vs. Supervisors, 16 Wallace, 688.

It is claimed by the counsel for the defendants in error in this case that the company has contracted that the Legislature may fix the rates of fare and freight which the company may charge upon its road, because the furnishing of the means of communication between different points in the State is a high prerogative right, one vested primarily in the sovereign power of the State; and, because by the acceptance of its charter the company has contracted to build a railroad, it has thereby contracted that the State may prescribe absolutely the terms upon which the roads shall be operated. The authority asserted is equivalent to a claim of a right on the part of the State to coerce the plaintiff in error, under heavy pains and penalties, to operate this road and its entire

equipment, and give the personal services of the agents employed in operating it, for the benefit of the public, at a compensation to be prescribed by the Legislature, whether reasonable or remunerative or not, and that such authority arises from the fact that it is a railroad. The question, then, is not whether the charter of a railroad company, and its acceptance, constitute a contract, but it is upon the construction of that contract. It is not whether the State has granted, in express terms to the railroad company the right to fix its rates of fare and freight, but whether the railroad company has contracted with the State to surrender the use of its property to the control of the State; and in construing this contract, the intention of the parties in making it must govern. I think it will be impossible to show that either the Territory of Minnesota, or the State of Minnesota, or this railroad company, ever intended to place the absolute disposal of the property used in the construction and equipment of this road in the power of the Legislature, without regard to the rights of the stockholders of the company. The millions of money which have been invested in this enterprise would never have been invested had the persons who built and equipped the road believed, or even imagined that their property was being placed entirely beyond their control, and in the control of a public whose interests were adverse to theirs. If it be true that the property is the property of the State, then the anomaly is presented of a State taxing one portion of its own property. If this railroad belongs to the State in the same sense that a common highway, which has been laid out by the State, belongs to the public, then the State taxes heavily one class of its highways while every other highway is

free from taxation; but this question has been so thoroughly and distinctly ~~stated~~ by this Court that it can not be necessary to discuss it at length. In the case of the State Freight Tax, 15 Wallace, 257, this Court says:

"We ~~consider~~ the right and power of a State to tax the "franchises of its corporations, and the right of the owners of "artificial highways, whether such owners be the State or "grantees of franchises from the State, to exact what they "please for the use of their ways. That right is an attribute "of ownership."

In the Delaware Railroad Tax case, 18 Wallace, 225, in speaking of a railroad charter, the Court says: "The con- "tract is clearly protected from legislative interference, whether "the public are interested in the exercise of its franchise or "the charter be granted for the sole benefit of its incorpora- "tors."

The case of the Tuckahoe Canal Company vs. Tuckahoe Railroad Company, 11 Leigh, 42, is in point. The Tuckahoe Canal Company was an incorporated company, and constructed and operated a canal. Afterward, the Tuckahoe Railroad Company was incorporated for the purpose of constructing a railroad. The railroad, as projected, was to cross the canal on two bridges. At the upper crossing the elevation of the bridge was to be six feet six inches above the common water level of the canal; but only three feet six inches above the towing path, and the space between the abutments was forty-six feet. The elevation of the bridge at the

lower crossing was to be thirteen feet above the canal, and the space between the abutments one hundred and forty feet. The elevation of these bridges above the canal, and the space between the abutments, were greater than the elevation of the bridges and the space between the abutments thereof which had been erected by the Tuckahoe Canal Company for the crossing of public and private roads over the canal. The canal company filed its bill and asked for an injunction against the railroad, and insisted that the erection of the bridges would obstruct or impede the navigation of the canal, and that its franchises could not be condemned under the law of eminent domain for that purpose. The opinion of the Court was delivered by Tucker, Presiding Justice. I quote from the opinion :

"What, then, is here insisted on? Is it a monopoly of "the right to take tolls for the transportation on the canal? "If this be all we can not gainsay it. The canal is their own "property; and property necessarily implies a right in the "owner to the exclusion of all others. Is it a monopoly of "the right to the transportation of the Tuckahoe Valley? If "so, the claim is not admitted. Upon the principles main- "tained by their counsel, it is denied. What right, upon "those principles, has the Legislature to take from the colliers "the liberty of transporting their coal either by wagons or in "any other mode they may elect? What right to prevent "their purchasing from the land-owners the necessary ground "and constructing a railroad *without a charter?* So far as "respects the canal company, the railroad needed no charter "to legalize their operations, if they did not cross the canal.

"It was only necessary to enable them to condemn the lands "of others, and to sue and be sued. They do not derive "their right to make such a road for the transportation of "coals from legislative grant. They would have had that "without it, and it could never be affirmed that a charter to "them invaded the previous charter, since, so far as the canal "company are concerned, a charter would have given them "nothing more than they had before, viz., a right to withdraw "their coals from the canal transportation, and to transport "them by land for themselves and others, according to their "own pleasure and ability." * * * *

"It seems to be supposed, however, that the rights of the "canal company, which are called a *franchise*, can not be "invaded; though the power to take other private property "for public uses may not be denied. It is proper, then, "to come to a proper understanding of this word *franchise*, "that we may the better comprehend what is to be "regarded as trenching upon it. Now, I take a franchise "to be: (1) An incorporeal hereditament; and, (2) A "privilege or authority vested in certain persons by grant "of the sovereign (with us by special statute) to exercise "powers or to do and perform acts which, without such "grant, they could not do or perform. Thus, it is the fran-"chise to be a corporation, with power to sue and be sued, "and to hold property as a corporate body. So it is a "franchise to be empowered to build a bridge or keep a ferry "over a *public* stream, with the right to demand tolls or ferri-"age, or to build a mill upon a *public* river and receive tolls "for grinding, etc. But the franchise consists in the incor-

"poreal right. The *property* acquired is not the franchise. "A bank has the right to purchase a banking house. When "purchased is the *house* a franchise? Surely not, for it is "*corporeal*, whereas a franchise is *incorporeal*. So of a rail- "road company; it has the franchise to condemn land for its "road, which at once becomes vested in the company an abso- "lute property; but the *land* is not the franchise. It is real "property held by the company upon the same implied terms "on which others hold their lands, that it may be taken for "public uses upon compensation being made. * * *

"Upon the whole, therefore, I think it was competent to "the Legislature to empower the railroad company to cross "the line of the canal whether the canal company be regarded "as the proprietors of the soil or of a mere right of way. If "they are proprietors of the soil, then they hold it upon the "same tenure as every man holds his land, that is, subject to "the *jus publicum*. If it is a mere right of way to which they "have a title, the argument applies with yet more force, since "the power to condemn the land itself is greater than that of "condemning an easement upon it. In the exercise of this "power, however, it must never be forgotten that a just com- "pensation for rights or property condemned must always be 'made."

But the reason given that these roads are public high- ways in the sense that the property in the ties and rails and equipment is in the State, or, in the modified sense contended for by the counsel for the defendants in error in this case, in his brief which has been filed, that the State, in the exercise

of a high prerogative right, can exercise exclusive control over it because it is a highway for the use of the public, in either ~~their~~ case fails utterly to support the inference intended to be drawn from it. If counsel, when he says that "the furnishing the means of communication between different points in a State is a prerogative right that is only vested primarily in the sovereign power of a State," means that the Legislature may, by taxation, build and equip a railroad and make it free to all the people in the State, it would then be asserting a principle in relation to the construction of a railroad which is conceded to be the law in relation to a common highway, and it certainly would not follow that, if the State should contract with a private party for the building of a public road, it would have the right to require the party to render his personal services in the transportation over such common highway of the persons and property of all the citizens of the State, and that the party should become the insurer of the persons and property so transported.

The prerogative right over a public highway would authorize the State to take this road and make it free by paying a suitable compensation to its owners, but it would not authorize the State to compel the company to operate the road without compensation; or, which is the same thing, for an inadequate compensation; and so the question returns to this—can the Legislature settle by decree what is a reasonable compensation?

The question whether the State has a prerogative right to furnish the means of communication between different

localities to its citizens, is entirely irrelevant to the question before the Court. Even should it be held that the State is the owner of this railroad, it would by no means be decisive of the question that it could require this railroad company to furnish the services of its agents and the use of its rolling stock for the transportation of the property and persons of the public, or to become insurers of the property transported upon the railroad. Whatever right the State might have to furnish the means of communication between different points in the State and the public, it has no right to require me to furnish transportation for the learned counsel upon the other side, and to insure his property during such transportation; yet that is the principle he asserts in this discussion. If the principle asserted in either of the foregoing propositions, to wit—that this railroad is a part of the public domain, or that it can be exclusively managed by the Legislature in the interest of the public by virtue of some prerogative right over highways—should be conceded, then it has this extent and no more, that the State may authorize the public to use this railroad with their own means of transportation, render the necessary services themselves and at their own risk, but it can not be contended upon any principle of law that ever was established in this country, or any country where constitutional government was acknowledged, that one man can be compelled to give the use of his property and to render his personal services to the public without compensation.

The right thus to take from this company its property without due process of law—for it can not be too strongly insisted upon that the right to control the use of the property per-

manently is property itself, and constitutes its entire value—can not arise from the mere fact that the plaintiff is a corporation. A principle as broad as this would enable the State to fix the price of every yard of cloth manufactured by a corporation, every pound of iron made or of coal mined, and every foot of lumber cut by a corporation, and would, in fact, give the State the absolute control of a very large portion of the property of the country, and would very soon make it impossible for private corporations to exist where the employment of capital was necessary; nor does it arise from the fact that the plaintiff is a common carrier, simply. Except as a police regulation in cities, the power has never been claimed by a State, or conceded to it, to regulate the compensation of common carriers, common carriers being entitled to a reasonable compensation for their services equally with every other class of citizens. Undoubtedly the State has the power to punish common carriers for extortion, as it possesses the power to punish any other class of citizens for the same offense. It may enact laws to prevent corporations from charging unreasonable compensation; but, before a corporation can be punished for exacting unreasonable rates, it must have its day in court, and be heard upon the question whether its rates have been unreasonable.

Some analogy is sought to be shown between the right claimed on the part of the Legislature to fix arbitrary and unreasonable rates of fare and freight upon railroads, and the right which is sometimes claimed to fix the rates of toll which may be charged by millers and ferrymen for their services. Upon this point I wish to offer the following suggestion:

First—That the right to fix the rate of toll to be charged by ferrymen, if it existed at all, must be based upon a reservation by the Legislature of the power to fix such rates in the act authorizing the ferry to be kept; or, as is more commonly the case, from the fact that the rates to be charged by the ferrymen are fixed definitely in the act by which the ferry itself is authorized, or from the fact that an exclusive privilege for some distance along a stream, which is a public highway, has been granted to an individual to cross persons and property, and all other persons are prohibited, under penalties, from engaging in the same occupation; or, because the ferry is across a stream which is public property, and which public property is used for the purposes of the ferry. If the ferry was across a water which was exclusively owned by the ferryman, situated upon his private grounds, the rule would be different. In the case of the Tuckahoe Canal Company vs. Tuckahoe Railroad Co., *supra*, the right is based upon the fact that the stream was a public one. There is no analogy between such a case and the case of a railroad company existing in a State which, by general law, authorizes any one who chooses to become incorporated for the very same purpose.

I apprehend that no case can be found where the right of the Legislature to fix the rates of ferriage has been judicially determined, where it is not placed upon one of the reasons above stated.

The right of the Legislature to fix the rates of toll to be taken by millers is a fragment of the old feudal law which has descended to our time long after the reason of the law had

ceased, simply because it has not been seriously questioned. Under the feudal law the lord of the manor had the right to require all the grain ground in the manor to be ground at his mill. This right rested upon an implied contract between the lord and the tenant, and was one of the conditions of the tenancy. This right being an exclusive one, and the tenant being compelled to have his grain ground in a particular mill, it resulted necessarily, that the price of such grinding should be limited. In this country, where the reason of the rule has failed, the right, when exercised, I apprehend, rests upon old precedents rather than any judicial determination of the question as affected by the constitutions of the different States, or that of the United States, and is a right assumed rather than adjudicated.

If it is to be determined that the owners of the vast amount of railroad property in the United States are to have, in the future, only such limited use of their property as different State Legislatures shall from time to time decree, it should definitely be shown in what manner they have lost the ordinary right to the use of their property—whether by the exercise of the sovereign power of the State, the same power that imposes taxation upon the citizen, or by the right of eminent domain, or by the establishment of the proposition, as a principle of law, that the stockholders have contracted that their property should "become part of the public domain," or that the use of the property should be vested in the public, while technically the ownership remained with them? For nothing can be clearer than that the right, if it exists at all, must rest upon one of these propositions; and if it is to be determined that

the stockholders of the Winona and St. Peter Railroad Company have thus parted with their property by their own contract, it should also appear by what language of the charter which they have accepted they have made such transfer of their property, or of their right to its beneficial use, that all men may avoid, in the future, mistakes so fatal. It is insisted that the rule for which I here contend places the corporation above the law, makes the creature greater than the creator, makes the power of one Legislature to grant power to corporations bind all succeeding Legislatures. In these catch-penny phrases, legislative discussions and partisan newspaper articles have abounded, and they appear often in papers that might have otherwise been legal arguments. It is scarcely necessary in this place to point out the fallacy embodied in such words, "full of sound and fury, signifying nothing." Is the citizen above the law because the Legislature may not do away with his contract, or take his property for public use without due compensation? If not, then the corporation is not above the law, because its contracts and property are equally protected by the Constitution. Is the Legislature the creator of the property of these stockholders? Did it provide the means to build and equip this road? or, on the other hand, when it takes the use of this property away from the stockholders, is it not rather "reaping where it has not sown and gathering where it has not strewed?" The question is not whether the corporations are above the law, but whether they are entitled to any protection from the law; not whether one Legislature can bind a subsequent one by an irrevocable grant of power, but whether the Legislature can take away property and rights never derived from the State, the right to the beneficial use of

its property, the right to equal and reasonable compensation for its personal services, rights so elementary and axiomatic as never to be questioned when claimed by any other parties than railroad corporations.

IV.

The act of March 6th, 1861, is not valid and applicable to the plaintiff in error in this case, because it is an attempt on the part of the State of Minnesota "to regulate commerce between the several States."

The two bales of cloth mentioned in this case were shipped from Chicago, in the State of Illinois, across the State of Wisconsin, to Rochester, in the State of Minnesota. The law of the State of Minnesota and the charter of this company made it the duty of the company to receive this cloth when delivered to it by the connecting road, and deliver it to the consignee in Rochester. (See section ten of the act of March 10th, 1862.)

If the State of Minnesota had the right to fix, by law, the rates of transportation which should be paid upon these two bales of cloth in the State of Minnesota, the State of Illinois had precisely the same right to fix the charges which should be fixed upon it in that State, and the State of Wisconsin the same right to fix the rate of charges upon the same goods while passing through that State, which is to concede to each State the right to regulate all inter-state commerce which

passes over any portion of its territory. To illustrate: Suppose the natural and best market for the wheat grown in Minnesota was in the city of New York, and the best route to that market was by rail through the States of Wisconsin, Illinois, Indiana, Ohio and Pennsylvania, and each of these States had the right to impose such rates of transportation as it pleased over its own territory, the very evil which was experienced before the adoption of the Constitution, and which the framers of that instrument sought to guard against by the provision giving to Congress the exclusive right "to regulate commerce among the several States," would be again experienced, and the citizens of each State would be at the mercy of every other State situated geographically between them and the market where their produce was sold or their supplies purchased.

This question has been decided, in precisely the shape in which it is presented in this case, by the Supreme Court of the United States, in the case of Reading R. R. Company vs. Pennsylvania, 15 Wallace, 232, commonly called the case of the State Freight Tax. In that case the Court held that the State Legislature could pass no act inconsistent with the exclusive power conferred upon Congress to regulate commerce among the several States; and that no distinction was to be made between freight transported from beyond the boundaries of the States through the State, and freight taken up within the State and carried out of it; or freight taken up outside the State and delivered within it; and denied the right of a State Legislature to interfere with inter-state commerce, by taxing freight other than that taken up and delivered within

the State. No distinction can be drawn as to the right of the Legislature to interfere with the freight taken up outside the State and carried through it, and its right to interfere with freight taken up within the State and carried beyond its boundaries. In either case, it is an attempt to regulate inter-state commerce.

In this case the Court said: "If, then, this is a tax upon "freight carried between States, and a tax because of its "transportation, and if such a tax is in effect a regulation of "inter-state commerce, the conclusion seems to be inevitable, "that it is in conflict with the Constitution of the United "States. It is not necessary, to present the case, to go at "large into the much-debated question, whether the power "given to Congress by the Constitution, to regulate commerce "among the States, is exclusive. In the earlier decisions of "this Court, it was said to have been so entirely vested in "Congress that no part of it can be exercised by a State. "It has, indeed, often been argued, and sometimes intimated "by the Court, that, so far as Congress has not legislated on "the subject, the States may legislate respecting inter-state "commerce. Yet, if they can, why may they not add regu-"lations to commerce with foreign nations beyond those made "by Congress, if not inconsistent with them, for the power "over both foreign and inter-state commerce is conferred "upon the Federal Legislature by the same words? And, "certainly, it has never yet been decided by this Court that "the power to regulate inter-state commerce is not exclusively "in Congress. Cases that have sustained State laws, alleged "to be regulations of commerce among the States, have been

passes over any portion of its territory. To illustrate: Suppose the natural and best market for the wheat grown in Minnesota was in the city of New York, and the best route to that market was by rail through the States of Wisconsin, Illinois, Indiana, Ohio and Pennsylvania, and each of these States had the right to impose such rates of transportation as it pleased over its own territory, the very evil which was experienced before the adoption of the Constitution, and which the framers of that instrument sought to guard against by the provision giving to Congress the exclusive right "to regulate commerce among the several States," would be again experienced, and the citizens of each State would be at the mercy of every other State situated geographically between them and the market where their produce was sold or their supplies purchased.

This question has been decided, in precisely the shape in which it is presented in this case, by the Supreme Court of the United States, in the case of Reading R. R. Company vs. Pennsylvania, 15 Wallace, 232, commonly called the case of the State Freight Tax. In that case the Court held that the State Legislature could pass no act inconsistent with the exclusive power conferred upon Congress to regulate commerce among the several States; and that no distinction was to be made between freight transported from beyond the boundaries of the States through the State, and freight taken up within the State and carried out of it; or freight taken up outside the State and delivered within it; and denied the right of a State Legislature to interfere with inter-state commerce, by taxing freight other than that taken up and delivered within

the State. No distinction can be drawn as to the right of the Legislature to interfere with the freight taken up outside the State and carried through it, and its right to interfere with freight taken up within the State and carried beyond its boundaries. In either case, it is an attempt to regulate inter-state commerce.

In this case the Court said: "If, then, this is a tax upon "freight carried between States, and a tax because of its "transportation, and if such a tax is in effect a regulation of "inter-state commerce, the conclusion seems to be inevitable, "that it is in conflict with the Constitution of the United "States. It is not necessary, to present the case, to go at "large into the much-debated question, whether the power "given to Congress by the Constitution, to regulate commerce "among the States, is exclusive. In the earlier decisions of "this Court, it was said to have been so entirely vested in "Congress that no part of it can be exercised by a State. "It has, indeed, often been argued, and sometimes intimated "by the Court, that, so far as Congress has not legislated on "the subject, the States may legislate respecting inter-state "commerce. Yet, if they can, why may they not add regu-"lations to commerce with foreign nations beyond those made "by Congress, if not inconsistent with them, for the power "over both foreign and inter-state commerce is conferred "upon the Federal Legislature by the same words? And, "certainly, it has never yet been decided by this Court that "the power to regulate inter-state commerce is not exclusively "in Congress. Cases that have sustained State laws, alleged "to be regulations of commerce among the States, have been

passes over any portion of its territory. To illustrate: Suppose the natural and best market for the wheat grown in Minnesota was in the city of New York, and the best route to that market was by rail through the States of Wisconsin, Illinois, Indiana, Ohio and Pennsylvania, and each of these States had the right to impose such rates of transportation as it pleased over its own territory, the very evil which was experienced before the adoption of the Constitution, and which the framers of that instrument sought to guard against by the provision giving to Congress the exclusive right "to regulate commerce among the several States," would be again experienced, and the citizens of each State would be at the mercy of every other State situated geographically between them and the market where their produce was sold or their supplies purchased.

This question has been decided, in precisely the shape in which it is presented in this case, by the Supreme Court of the United States, in the case of Reading R. R. Company vs. Pennsylvania, 15 Wallace, 232, commonly called the case of the State Freight Tax. In that case the Court held that the State Legislature could pass no act inconsistent with the exclusive power conferred upon Congress to regulate commerce among the several States; and that no distinction was to be made between freight transported from beyond the boundaries of the States through the State, and freight taken up within the State and carried out of it; or freight taken up outside the State and delivered within it; and denied the right of a State Legislature to interfere with inter-state commerce, by taxing freight other than that taken up and delivered within

the State. No distinction can be drawn as to the right of the Legislature to interfere with the freight taken up outside the State and carried through it, and its right to interfere with freight taken up within the State and carried beyond its boundaries. In either case, it is an attempt to regulate inter-state commerce.

In this case the Court said: "If, then, this is a tax upon "freight carried between States, and a tax because of its "transportation, and if such a tax is in effect a regulation of "inter-state commerce, the conclusion seems to be inevitable, "that it is in conflict with the Constitution of the United "States. It is not necessary, to present the case, to go at "large into the much-debated question, whether the power "given to Congress by the Constitution, to regulate commerce "among the States, is exclusive. In the earlier decisions of "this Court, it was said to have been so entirely vested in "Congress that no part of it can be exercised by a State. "It has, indeed, often been argued, and sometimes intimated "by the Court, that, so far as Congress has not legislated on "the subject, the States may legislate respecting inter-state "commerce. Yet, if they can, why may they not add regu-"lations to commerce with foreign nations beyond those made "by Congress, if not inconsistent with them, for the power "over both foreign and inter-state commerce is conferred "upon the Federal Legislature by the same words? And, "certainly, it has never yet been decided by this Court that "the power to regulate inter-state commerce is not exclusively "in Congress. Cases that have sustained State laws, alleged "to be regulations of commerce among the States, have been

"such as related to bridges or dams across streams wholly "within a State, police or health laws, or subjects of a kindred "nature, not strictly commercial regulations. The subjects "were such as, in Gilman vs. Philadelphia (1), it was said, "'can be best regulated by rules and provisions suggested by "'the varying circumstances of different localities respectively.' "However this may be, the rule has been asserted with great "clearness, that whenever the subjects over which a power to "regulate commerce is asserted are in their nature national, "or admit of one uniform system or plan of regulation, they "may justly be said to be of such a nature as to require "exclusive legislation by Congress. Surely, transportation "of passengers or merchandise through a State, or from one "State to another, is of this nature."

In another part of the opinion the Court speaks as follows: "Nor is a rule prescribed for carriage of goods through, out "of, or into a State, any the less a regulation of transporta- "tion, because the same rule may be applied to carriage which "is wholly internal. Doubtless a State may regulate its com- "merce as it pleases. If a State chooses to exact conditions "for allowing the passage or carriage of persons or freight "through it into another State, the nature of the exaction is "not changed by adding to it similar conditions for allowing "transportation wholly within the State."

The gravity of the questions submitted to the decision of the Court in this case can not be over-stated. The amount of property to be affected by the decision can scarcely be estimated. The power claimed to exist in the Legislature affects all the railroad property in the United States.

The power to fix equal and reasonable rates of compensation for the transportation of persons and property is of value and importance to a railroad corporation; it is essential to the enjoyment of the franchise, and is presumed to have been the consideration for which the corporators accepted the charter, invested their money and assumed the obligations imposed upon them Of course, if the corporation has not the right to charge equal and reasonable rates of compensation for its services, and the Legislature has the right to fix those rates, it can fix them as it pleases, whether the rates thus fixed are remunerative or not. There can be no appeal from the decision of the Legislature to the decision of a jury upon the question whether those rates are reasonable or unreasonable. What is there in the nature of the property invested in railroads which deprives it of the protection which the law affords to every other kind of property? Why is it that the Legislature has the power to deprive the owner of this kind of property of its beneficial use, in fact, to make it valueless, which does not apply to any other species of property? Suppose one man has the capital to build a railroad on his own land five miles long: can the Legislature say that he could not transport freight upon it, at fair rates, for whoever chose to employ him to do it? A vessel navigating a public highway, a stage coach or a wagon running upon a public road have these rights without any charter. How is it that, when ten men are authorized to act together to construct such a road, to use a corporate name, to unite their capital, with a liability on the part of each one limited to the amount of the stock holden by him, the nature of the property has become

so changed as to have lost the protection which the law affords to the property of an individual ?

That such a reduction of tolls is a taking of private property, was expressly decided by Mr. Justice Miller in the case of the United States vs. The Louisville and Portland Canal Co. The case was this: On the 12th of June, 1825, the Kentucky Legislature chartered a corporation by the name of the Louisville and Portland Canal Company to construct a canal around the falls of the Ohio river, with the right to levy tolls on vessels passing through the canal. The tolls collected under the limit of the charter granted by the State yielded such a revenue beyond what was necessary to keep the canal in repair, that, by the joint legislation of the State and of the United States, and the consent of the individual incorporators, a plan was adopted to make the canal free, except so far as it might be necessary to keep it in repair. The stockholders accepted this legislation. This plan was so far carried out, that, in the year 1855, all the shares other than those held by the United States had been bought in, except five shares left purposely in the hands of individuals to qualify them as directors. June 1st, 1872, Congress made an appropriation as follows: "For the continuing of the work upon "the canal at the falls of the Ohio river, $300,000; and the "Secretary of War is hereby directed to report to Congress, "at its next session, or sooner if practicable, the condition of "said canal, and the provisions necessary to relieve the same "from incumbrance, with a view to such legislation as will "render the same free to commerce at the earliest practicable

"period, subject only to such tolls as may be necessary for the "superintendence and repair thereof, which shall not, after the "passage of this act, exceed five cents per ton." The officers of the United States proceeded to use the money as indicated in the appropriation, but were resisted by the officers of the corporation, the officers of the canal company maintaining that a due regard to their duty to the bondholders and other creditors of the corporation forbade them from accepting the appropriation, either expressly or by such consent as inaction would imply, because, by so doing, they would accept that portion of the act which reduced the tolls to five cents per ton, which would not yield a revenue sufficient to pay the obligations of said company. The United States filed a bill against the company to enjoin them from interfering with the work. The application was made to Mr. Justice Miller for the injunction. In giving his opinion, he uses this language:

"There are three parties interested deeply in this trust, and "in the manner in which its duties shall be discharged, which "I name in order of the superiority of their claims, rather "than of their merits:

"*First.* The holders of bonds secured by the mortgage "authorized and placed under the sanction of the Legislature "of Kentucky and of the Congress of the United States;

"*Second.* The United States, the holder of all the stock in "the corporation, expending a million of dollars besides for "the benefit of the canal; and

"*Third.* The public, the community to whose use, free of

"all charges but those necessary to keep it in operation, it has "been solemnly dedicated by the Legislature of Kentucky, by "the Congress of the United States, and by the action of the "corporation itself.

"As regards the first of these, I have no hesitation in ex- "pressing my entire conviction that the bondholders have a "lien upon the revenue of the canal, and a right to insist that "the corporation shall protect these revenues to the extent "necessary to make entirely safe the payment of their debt "and its accruing interest, and that until that debt is paid, or "the mortgage satisfied, or otherwise discharged with the con- "sent of these bondholders, this right of theirs remains, with "the corresponding duty of the directors of the corporation.

"I am satisfied that the president and directors are honest "in their belief that acquiescence on their part in the expend- "ing of this appropriation on the canal would bind them "legally as an acknowledgment of the Government limitation "of the toll, which would be a violation of their official duty.

"If this construction of the statute be correct, then I have "no hesitation in saying that that part of it which so limits "the tolls is void, for the plain reason that it is a legislative "attempt to destroy vested rights, and a taking of private "property for public use without due compensation."

This decision is printed at length in a letter from the Secretary of War to Congress, transmitting papers relative to the canal at the falls of the Ohio river, Dec. 2d, 1872.

The Constitution of the State of Minnesota provides that private property shall not be taken for public use without just compensation. Can the Legislature pass a law taking the private property of any citizen at a compensation to be definitely fixed in the law itself, and thereby deprive the citizen of the right to insist in a Court that the compensation thus provided is not an adequate and a just compensation? If this can not be done, then it follows, necessarily, that, when the State has contracted with this railroad company that it may charge a reasonable compensation for the transportation of persons and property, the Legislature can not determine, authoritatively, what such reasonable compensation shall be.

I need not attempt to prove by argument that property which the owner may not control, but which he may be compelled to maintain and use without compensation, has no longer any value; that whenever the absolute control of property is vested in any person or in any body of men whose interests are adverse to those of the nominal owner, the value of the property to the owner is gone. If proof were needed, it may be found in the number of railroads in Wisconsin and Minnesota now in the hands of receivers, in the fact that the building of all roads not completed when these acts were passed has been suspended, in the utter impossibility of procuring capital for the construction of new roads, and in the general paralysis that has come upon all railroad enterprises in those States. How long would the raising of wheat in Minnesota for exportation be profitable or be continued, if the price might be fixed absolutely and without appeal by a majority vote of the consumers of the flour? The construction

of railroads has contributed more than any cause to the development and material prosperity of the country. No theory which takes the control of railroad property from its owners is compatible, not merely with the construction of new railroads, but with the maintenance of those already in existence, unless by the process of taking them from the hands of their stockholders and selling them to parties who will be required to pay no consideration for them in comparison with their cost.

The question has arisen in this case whether the property which has been invested in railroads belongs to the stockholders or to the State. The principle involved is by no means limited to the railroad property. The theory that a public use of property subjects the property to the control of the public, and leaves to the owner no right to its beneficial use, is one that affects all corporations in which private capital is employed for uses of a public charter — telegraph companies, vessel companies, hotels, newspapers, and all manufacturers of necessary articles. If it may be decreed by a Legislature that the property of a railroad corporation may be taken for public use without adequate compensation, or that the corporation may be deprived of its beneficial use, the guarantees of the rights of property and of the avails of labor contained in the Constitution of the United States will have been broken down, and the question who shall next see his property "become a part of the public domain" will be determined by a majority vote.

B. C. COOK,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1875.

WINONA & ST. PETER R. R. CO.,
Plaintiff in Error,

vs.

JOHN D. BLAKE ET AL.,
Defendants in Error.

BRIEF AND ARGUMENT.

C. B. LAWRENCE,

Of Counsel for Plaintiff in Error.

CHICAGO, ILL.:

CHARLES E. SOUTHARD, PRINTER, 175 MONROE STREET.

1875.

Supreme Court of the United States.

OCTOBER TERM. 1874.

WINONA & ST. PETER R. R. CO., *Plaintiff in Error,*
vs.
JOHN D. BLAKE *et al.*, *Defendants in Error.*
} *Error to the Supreme Court of Minnesota.*

STATEMENT OF THE CASE.

This record presents the question, whether an act of the Legislature of Minnesota, passed March 6, 1871, entitled, "An act to regulate the carrying of freight and passengers "on all railroads in this State," is a violation of the Constitution of the United States? The act establishes certain rates of compensation for the carriage of both passengers and freight, which it declares shall not be exceeded; and imposes upon any company that shall violate the act a fine not exceeding one thousand dollars for each offense, or a forfeiture of its charter and franchises.

The first section of the act prescribes specifically the rates of freight of various kinds. The second section prescribes the passenger rates. Sections eight and nine are as follows:

"SEC. 8. That all lines of railroad in this State are hereby "declared to be public highways; and all persons shall have

"and enjoy the right of passage over the same in the passenger "cars running and to be run thereon, and the right to have "freights of all kinds transported upon and over any and all "of such railroads, in the cars running and to be run thereon, "at rates of charges not exceeding those specified in this act. "And each and all railroad companies doing business in this "State are hereby required to transport all passengers and "freights in the manner and at rates not exceeding those "specified in this act; and if any railroad company or "corporation shall fail to do so, or shall violate any of the "provisions of this act, such company or corporation shall "pay to the party aggrieved by such failure, the sum of one "thousand dollars, as settled and liquidated damages, to be "recovered by the party injured, in a civil action, and the "costs and disbursements of such action.

"SEC. 9. The rates established by this act for the trans- "portation of freight and passengers are hereby declared to "be the maximum of reasonable rates. If any railroad "company or corporation shall demand or receive higher "rates for such transportation than are established by this "act, it shall be deemed to have misused its powers and "violated the terms on which its charter and franchises were "granted; and it is hereby made the duty of the Attorney "General of this State, upon receiving satisfactory evidence "of such misuse, to cause proceedings to be instituted and "prosecuted against such railroad company or corporation, in "the proper court, for the forfeiture of the charter and "franchises of such railroad company or corporation, or for "the collection of a fine not exceeding one thousand dollars

"for each violation of the provisions of this act, at the "discretion of the court before which the case shall be tried."

The plaintiff in error, being advised that this act of the Legislature was invalid, refused to comply with it. On the first day of June, 1871, the defendants in error, John D. Blake & Co., shipped two bales of cotton cloth from Chicago, in Illinois, to Rochester, in Minnesota. The last part of the transportation was over the road of the plaintiff in error. When the goods arrived at Rochester, consigned to defendants in error, they tendered to the plaintiff in error the back charges and such compensation as the plaintiff in error would have been entitled to receive under the act of the Legislature. The amount thus tendered under the act was fifty-seven cents. The amount demanded by the plaintiff in error was one dollar, which was its regular rate under its published tariffs, and the same rate which it had previously charged for like services. As the company declined to deliver the goods, unless paid their customary charges, Blake & Co. replevied them. The case came on for trial before the District Court, a jury being waived. The Court found the facts as we have above stated them; and further found, that it was stipulated by the parties, if the act of March 6, 1871, was valid in its provisions applicable to the defendant in the Court below, then the judgment should be for the plaintiff, but otherwise, for the defendant.

The Court further found, that no complaint was made as to the reasonableness of the charge of one dollar for the services rendered, independently of the fact that the statute assumes to make fifty-seven cents sufficient.

The District Court held the act invalid, and rendered judgment for the defendant. The plaintiff appealed to the Supreme Court of the State, which held the act valid, and reversed the judgment of the District Court. To that judgment a writ of error was prosecuted, under which the case has been brought to this Court.

The legislation of Minnesota, in regard to the plaintiff in error, is as follows:

On the 3d of March, 1855, the then Territory of Minnesota passed an act, entitled "An act to incorporate the Transit "Railroad Company," by which the corporation was authorized to construct, use and operate a railroad from Winona westward, and this was declared to be the purpose and object of the act. The act contained the ordinary provisions of railway charters, except that it did not in express terms grant the power of demanding compensation for the carriage of passengers and freight. It did, however, in express terms, *recognize* the right to demand compensation. Thus, in the thirteenth section it provided that conductors should wear badges, and that "no conductor or collector shall demand or be entitled "to receive any fare or toll, from any freighter or passenger," unless he should wear such badge.

Section 7 of the charter provides that "all the affairs and "business of said company shall be conducted by, or under "the direction of, the Board of Directors; and they are "authorized, for the purposes specified in this act, to make "and establish regulations and by-laws, and to do all things

"necessary to be done, not inconsistent with the Constitution "and laws of the United States, or of the laws of this Terri- "tory, or of this act."

On the 3d of March, 1857, Congress passed an act granting land in the Territory of Minnesota to aid in the construction of certain railroads in that Territory, and among others a road from Winona to the Big Sioux river. The act provided that the roads receiving the benefit of the grant should transport the property or troops of the United States "free from toll "or other charges," and should also transport the mails "at "such price as Congress may by law direct."

On the 22d of March, 1857, the Territory passed an act, entitled "An act by the Minnesota Legislature to execute the "trust created by act of Congress, and granting lands to the "Transit Company." This act granted to the Transit Company the land appropriated by Congress to aid in building a road from Winona to the Big Sioux river. The grant required the road to be completed by March 3, 1867, and that the company should pay to the Territory or State of Minnesota three per cent. of the gross earnings of said road. The act also contained the same provision, in regard to the property, troops and mails of the United States, that was contained in the act of Congress. This act, like the original charter, is silent as to the matter of charging compensation for services, except that it provides, in section 8, that the Southern Minnesota & Root River Valley Railroad Company "shall have at all times the right to send passengers and "freight over the Transit railroad at as low rates and charges

"per mile as the said Transit Railroad Company may charge "over any portion of their said road."

Subsequently, the State loaned its credit to this and other railway companies; the company failed to pay its interest; the mortgage given by the company was foreclosed, and, in pursuance of an act of the Legislature passed March 6, 1860, the Governor bid off the property and franchise of the company for the State.

On the 10th of March, 1862, the Legislature created a new corporation, called the "Winona & St. Peter Railroad "Company," the present plaintiff in error, and granted to it all the property and franchises theretofore granted to the Transit Railroad Company, and imposed the same obligations as to building and operating the road, with some slight modifications as to time. This act contained no provisions as to rates, except one requiring the company to transport passengers and freight, delivered to it by any connecting line of railroad, "on the same terms and at no greater rates than for "the time being shall be charged by said Winona & St. Peter "railroad, for the same services, to persons living on the line "of said road."

On the 28th of February, 1866, the Legislature extended the time for building the road, and annexed, as a condition of such extension, the following proviso: "*Provided, that such "company shall be bound to carry freight and passengers upon "reasonable terms.*"

The foregoing statement shows the substance of the legislation of Minnesota, in regard to this railway company,

bearing upon the question now at issue, prior to the 6th of March, 1871. There is no grant in express terms of a right to charge compensation for the transport of passengers and freight, unless in the general grant of power to the Directors, in the seventh section of the charter above quoted, and in the proviso last quoted.

The opinion of the District Court specifies these various acts of the Territorial and State Legislatures as facts found by the Court. In order to comply with the rule of the Court, they are printed and annexed to the arguments herein as an appendix.

ERRORS ASSIGNED.

1. The Supreme Court of Minnesota erred in holding that the said act of the Legislature of that State, passed May 6th, 1871, was a valid law, and not a violation of the Constitution of the United States or of the act of Congress, and that the judgment of the District Court in favor of the present plaintiff in error should be reversed.

2. The Supreme Court of Minnesota erred in holding that the Legislature of that State could determine the maximum rates to be charged by the plaintiff in error for transporting passengers and freight, and fix such rates by an arbitrary enactment.

BRIEF OF THE ARGUMENT.

I.

The charter of the plaintiff in error is a contract of such character as to fall under the protection of the tenth section of the first article of the Federal Constitution, which forbids a State to pass a law impairing the obligation of contracts.

AUTHORITIES.

Dartmouth College vs. Woodward, 4 Wheat., 513.

Minot vs. P., W. & B. R. R. Co., 18 Wall., 225.

Wilmington R. R. Co. vs. Reid, 13 Wall., 266.

Charles River Bridge vs. Warren Bridge, 11 Pet., 536.

Bridge Proprietors vs. Hoboken County, 1 Wall., 117.

Binghampton Bridge Case, 3 Wall., 51.

Angell & Ames on Corp., page 7.

State Freight Tax, 15 Wall., 233.

Olcott vs. Supervisors, 16 Wall., 688.

People vs. Batchelor, 53 N. Y., 139.

P., W. & B. R. R. Co. vs. Bower, March number of *Law Register*, 1874.

People vs. Salem, 20 Mich., 477.

Tomlinson vs. Jesup, 15 Wall., 457.

Holyoke Co. vs. Lyman, *Ib.*, 511.

Miller vs. State, *Ib.*, 488.

Tinsley vs. B. & D. R. R. Co., 2 Dutch., 148.

Donnahue vs. State, 8 Swedes & M., 649.

Thorpe vs. R. &. B. R. R. Co., 27 Vt., 140.

Dearborn vs. B. & M. R. R. Co., 4 Foster, 179.

Bailey vs. P. & W. R. R. Co., 4 How., 389.

II.

Although the charter of a railway company does not, in express terms, grant the right to demand compensation for the carriage of passengers and freight, yet the right to demand reasonable compensation is necessarily given by implication, as the only mode by which the object of the charter can be accomplished, and the only means by which the company can perform the obligations imposed upon it, and save its franchises and property from destruction.

If this power exists by necessary implication, it can no more be taken away than if it had been granted in express terms, and an act of the Legislature taking it away violates the contract.

AUTHORITIES.

2 Kent, 298.

Dartmouth College vs. Woodward, 4 Wheat., 513.

Perine vs. C. & D. Canal Co., 9 How., 177.

People vs. Manhattan Co., 9 Wend., 392.

Enfield Bridge Company vs. H. & N. H. R. R. Co., 17 Conn., 454.

Beaty vs. Knowler, 4 Peters, 162.

III.

Independently of the implied grant of power, the right to demand reasonable compensation for the use of its property belongs to the company, as an attribute of ownership and of existence. Therefore, the act violates the fourteenth amendment of the Constitution of the United States, which provides that "No State shall deprive any person of life, liberty or

"property without due process of law, nor deny to any "person within its jurisdiction the equal protection of the "laws."

An act which deprives the plaintiff in error of the right to demand reasonable compensation for the use of its property and the services of its agents, deprives it of its property without "due process of law," and denies to it "the equal "protection of the laws."

AUTHORITIES.

State Freight Tax, 15 Wall., 233.
Van Hoffman vs. City of Quincy, 4 Wall., 535.
Pumpelly vs. Green Bay Co., 13 Wall., 66.
Green vs. Biddle, 8 Wheat., 355.
Wynehamer vs. The People, 13 N. Y., 392.

IV.

The right to charge a reasonable compensation being implied in the charter, and also existing under the general law as an attribute of ownership of the corporate property, and an incident to the performance of corporate services, the question of what is a reasonable compensation is a judicial question, which can not be decided by the Legislature. Its determination belongs to the Courts, where the company can justify its charges by proper evidence and be heard in its own defense.

AUTHORITIES.

P., W. & B. R. R. Co. vs. Bower, March number of *Law Register*, 1874.
Commonwealth vs. Proprietors of Bridge, 2 Gray, 339.

Chicago & Alton R. R. Co. vs. The People, 5th Chicago *Legal News*, 266.

State vs. Noyes, 47 Maine, 203.

V.

The act violates that provision of the charter of the plaintiff in error which gave the management of the affairs of the company to the Board of Directors, and expressly authorized them, "for the purposes specified in this act, to make and "establish regulations and by-laws, and to do all things "necessary to be done not inconsistent with the Constitution "of the United States, or with the laws of this Territory, or "this act."

Dartmouth College vs. Woodward, 4 Wheat., 513.

P., W. & B. R. R. Co. vs. Bower, *Law Register*, March, 1874.

It also violates that provision in the act of February 28th, 1866, which says, "such company shall be bound to carry "freight and passengers upon reasonable terms."

VI.

The act violates, in principle, the terms of the Congressional land grant of the 3d of March, 1857, which required, as one of the conditions of the grant, that the roads receiving its benefit should transport the property or troops of the United States "free from toll or other charges," and should also transport the mails "at such price as Congress may by "law direct." If the Legislature of Minnesota can pass this act, it can fix a rate of compensation which will prevent the operation of the road, or disable it from performing its duties to the General Government.

ARGUMENT.

I.

The first proposition of the foregoing brief is, that the charter of the plaintiff in error is a contract of such character as to fall under the protection of the tenth section of the first article of the Federal Constitution, which forbids a State to pass a law impairing the obligation of contracts.

I should not feel justified in consuming the time of this Court by even a brief discussion of this proposition, if its truth had not been widely denied in some of the Western States, and if laws had not been enacted based upon such denial.

The act under consideration is framed upon the principle that such charters are not inviolable contracts, and it is claimed by those who favor such legislation that this question has not been directly decided by this Court.

It is true the naked question, whether there is any peculiarity in a railway charter which should distinguish it from other private charters granted by the State, and divest it of the character of a contract protected by the Federal Constitution, has not been presented to this Court in a form to elicit elaborate discussion. But it has in fact been *decided* by the Court in various cases, that railway charters do not differ in this respect from other legislative contracts, and decided in a manner indicating that the Court did not consider the question open to serious controversy.

A contract by a State to relinquish its power of taxation over any property within its jurisdiction, would hardly be recognized by the Courts as valid, if the question were a new one. Nevertheless, in the recent case of the Pacific R. R. Co. vs. Maguire, 20 Wallace, 42, this Court held that such a provision in the charter of a railway company was a valid contract, and protected by the Constitution of the United States from violation by the Legislature. The Court, in its opinion, refers to its previous decisions, and quotes from the similar case of Wilmington R. R. Co. vs. Read, 13 Wallace, the language of Mr. Justice Davis in delivering the opinion of the Court, as follows:

"It has been so often decided by this Court that a charter "of incorporation granted by a State creates a contract be- "tween the State and the corporators which the State can not "violate, that it would be a work of supererogation to repeat "the reasons on which the argument is founded."

The same point, as to taxation, was ruled in Humphrey vs. Pegues, 16 Wallace, 247.

While, then, this Court has never elaborately discussed the question whether any difference exists between railroad and other charters as to immunity from legislative interference, that question has nevertheless been repeatedly decided, and simply not discussed because not regarded as debatable.

In view of these utterances of this Court it seems almost an impertinence to make any observations upon this point, but the

its charter requires, neither its charter, its material property, nor its franchises can be taken away.

Into which of these classes a railway corporation falls really admits of no debate. The persons named in the charter cannot be compelled to accept it and construct the road. When they do accept it, and with their own resources construct the road upon its faith, it becomes a contract, and, in the absence of a reserved right, there is no power in this country which can take it away or impair it; and no power, except that of the mob, which can take the property or income of the corporation which the charter creates.

In the Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 509, Mr. Justice Story used the following language, which is very appropriate to the point under consideration:

"The fact, then, that the charity is public, affords no proof "that the corporation is also public; and, consequently, the "argument, so far as it is built on this foundation, falls to "the ground. If, indeed, the argument were correct, it would "follow that almost every hospital and college would be a "public corporation—a doctrine utterly irreconcilable with "the whole current of decisions since the time of Lord Coke. "When, then, the argument assumes that, because the charity "is public, the corporation is public, it manifestly confounds "the popular with the strictly legal sense of the terms; and "if it stopped here, it would not be very material to correct "the error. But it is on this foundation that a superstructure "is erected, which is to compel a surrender of the cause. "When the corporation is said at the bar to be public, it is

"not merely meant that the whole community may be the "proper objects of the bounty, but that the Government has "the sole right, as trustee of the public interests, to regu- "late, control and direct the corporation, and its funds and "its franchises, at its own good will and pleasure. Now, "such an authority does not exist in the Government, ex- "cept where the corporation is in the strictest sense public; "that is, where its whole interests and franchises are the "exclusive property and domain of the Government itself."

The real question is, where is the ownership of the corporate property? If it belongs to the stockholders in the corporation, the corporation itself holding and administering it as their trustee, then the property is private property, and the corporation a private corporation. If the corporation is public—that is, if the corporate property belongs wholly to the State, or if the corporation is municipal—the Legislature may control its property for the public benefit, under the management of agents to be appointed by the State. But there is no middle ground. The argument which leads to the conclusion that a railway can be made profitless to its stockholders by a legislative regulation of its tariff, on the ground that it is a public corporation, leads also to the further and inevitable conclusion, that the Legislature can take possession, at discretion, of the road bed, cars and engines, and operate them, through agents of its own, for what it may deem the public benefit, without compensation to the owners.

But it is claimed by those who assert this plenary power of the State, that though the railroad bed and its appurten-

question is so earnestly pressed in the present case that I can not wholly ignore it.

The ground upon which it is claimed that railway charters are subject to legislative control is briefly this: It is said that railway corporations are public and not private corporations; that it is because they are public corporations that they can be clothed with the right of eminent domain; and being public corporations, they hold their franchises and their property at the discretion of the Legislature.

The distinction between public and private corporations is so well settled in all American courts that it requires some hardihood to urge, before this tribunal, that railway companies fall in the former class.

In Angell & Ames on Corporations, page 7, the learned authors, after defining a public corporation as one endowed with a portion of the political power of the State, like a municipal corporation, proceed as follows: "Another class of "public corporations are those which are founded for public "though not for political or municipal purposes, and the *whole* "interest in which belongs to the Government. The bank of "the United States, for example, if the stock belonged *exclu-* "*sively* to the Government, would be a public corporation; "but inasmuch as there are other and private owners of the "stock, it is a *private* corporation"—citing Dartmouth College vs. Woodward, 4 Wheat., 668, and 2 Kent, 222. And on page 22, after saying that public corporations "can not have

"the least pretense to sustain their privileges or their existence "upon any thing like a *contract* between them and the Legis- "lature, because there can be no reciprocity of stipulation," the text proceeds as follows: "Private corporations, on the "other hand, are created by an act of the Legislature, which, "in connection, with its acceptance, is regarded as a compact. "* * * A bank, for instance, may be created by the "Government for its own uses; but if the stock is owned by "private persons, it is a private corporation, although it is "erected by the sanction of public authority, and its objects "and operations partake of a public nature. Railroads are "private corporations, and generally speaking, say the Court, "in the case of Bonaparte vs. Camden R. R. Co., 1 Bald., C. "C. Rep., 205, 'public corporations are towns, cities, counties, "'parishes existing for public purposes; private corporations "'are for banks, insurance, roads, canals, bridges, etc., where "'the stock is owned by individuals, but their use may be "'public.'"

I have quoted this extract from Angell & Ames because it expresses with precision the result of what has been said by Courts and text-writers, in defining the distinction between public and private corporations. In the former, there is no element of *contract*, because the State is substantially the sole party. There is no party of the second part, whose acceptance of the charter is necessary in order to give it effect. In private corporations, on the other hand, the corporators do not become such until they accept the charter. It can not be forced upon them. When accepted, it becomes a *contract*, and is inviolable by the State. While the corporation does what

ances belong to the corporation, it holds the property in trust for the public. In a certain sense, this is true, and in the same sense in which this Court said, in the case of Olcott vs. The Supervisors, 16 Wall., 688, that "railways, though con-"structed by private corporations and owned by them, are "public highways." The property is held in trust for the public, because it can not be perverted to other than railway uses, in which the public has a permanent right. The company holds it only for that purpose, and to that extent it may properly be said to be held in trust for the public. For the same reason, railways may properly be called "public high-"ways." They are so in the sense that all persons have a right to have themselves and their property carried upon them, on such reasonable terms as are at once consistent with the prosperity of the corporation and the welfare of the public. They are public highways in the sense that their use is public. This is no new doctrine.

It is, however, simply absurd to say, because the public has the right to require the property to be kept sacred to the public use, it has therefore a right to use it for nothing, or to seize it through the State authorities, without compensation. It is absurd to say that there can be no beneficial use in the public short of absolute control, or that there may not be such a beneficial use as to justify granting the power of eminent domain, and, at the same time, conceding the rights of private ownership to the extent to which these rights are claimed for railway corporations. For it is to be remembered that these corporations do not claim an absolute ownership, but only an ownership subject to the right of all persons to

have themselves or their property transported over the road for a reasonable compensation, and to have the property kept perpetually for that use, but subject to the management of the corporation.

As to the argument based upon the exercise, by railway companies, of the power of eminent domain, little need be said. Its fallacy is transparent.

It is true the right of eminent domain can only be exercised for the public good, and private property can only be taken against the will of the owner for public uses. But the fallacy of the argument lies in the assumption, that because the *uses* for which property is taken are so far public as to justify the taking, therefore the corporation which is authorized to take must be a public corporation, and its property public property. The assumption is untenable, and hardly rises to greater dignity than a mere play upon words.

The fact, that a railway is in a certain sense a public highway, over which the public has a right to be carried and to have its property carried, subject to the payment of a reasonable compensation, and which highway must forever be kept open for that purpose, is a sufficient reason for a grant by the State, to the persons or corporation that will build the road, of the right of eminent domain. But surely the grant of that right is consistent with leaving the ownership of the property, subject to the public uses, in the persons whose money has built the road. The public has a right to insist that the property which has been condemned under the power of eminent domain shall

remain subject to the uses for which it was condemned, but certainly that does not involve a right on the part of the public to use the property without compensating those who had paid for its condemnation.

All courts and text-writers agree that this power of eminent domain may be exercised directly by the State, through its officers, or indirectly by agencies to which the State sees proper to grant the power. The limitation is that the power can be exercised only for the public good. The object being a proper one, the State can delegate the power as well to a single person as to a corporation composed of various persons. It is true, as a matter of fact, that the right of eminent domain is ordinarily conferred only upon corporations, and but rarely upon natural persons or upon a single individual. But as to the *right* of the State to delegate this power to a natural person, to be exercised for a proper pnrpose, there can be no doubt. The cost of building a railroad is so great that combined capital is needed for its construction, and the convenience of the public, as well as the security of the capitalist, make it desirable to give the capital a corporate form. But, if one person or five persons will construct a road in their natural capacity, and without becoming a corporation, and the Legislature authorizes them to do so, and to condemn land for that purpose, there can be no doubt of the validity of such a grant of power.

Suppose such a case to occur. Suppose a State Legislature authorizes five persons, by name, to build a railroad as co-partners, giving no corporate rights, and providing that they

shall possess none, but shall construct the road and operate it on the footing of natural persons. Under this grant of power, the persons named in the act proceed to construct the road. They buy the necessary land, where they can buy it, and where they can not they exercise the power of eminent domain and condemn it; but in both cases they pay its full value, and, according to ordinary experience, much more. They complete and equip the road, and, in doing this, expend some millions of their private fortunes. They suppose the road is their property, to be held by them, it is true, for the use of the public, but the use to be upon condition that those who enjoy it shall make such reasonable compensation therefor as will render to the owners a reasonable return for the capital they have invested. They therefore fix certain rates at which they will carry the public, or the property of the public, from point to point upon their road. The public pays cheerfully for a time, but finally concludes that it would be pleasanter to pay less, and asserts a right to determine for itself what it will pay, which, of course, includes the right to determine whether it will pay any thing. If the public, through the Legislature, can fix an arbitrary rate at all, of course it can fix whatever rate it pleases. The owners of the road naturally object to this proceeding on the part of the public, and they are then told that, because a small portion of the property invested in their enterprise was acquired under the power of eminent domain, granted to them by the State, which power can only be exercised for public uses, therefore the public has a use in their road, and a use of such exclusive character as to make it, in fact, the owner of the road. It may prescribe the terms upon which it will be carried, or it

may take the road as its property. Of course, if it may do one it may do the other. The five persons who have invested their fortunes in a great public enterprise, on the faith of the State, and under the belief that their property will receive that protection which it is one of the chief objects of all enlightened governments to give, suddenly find it seized and appropriated, without compensation, for the supposed benefit of the public.

Surely any process of argument which leads to the conclusion that the State has the right to do this—a conclusion which shocks the moral sense—must be unsound. The unsoundness here consists in the palpably erroneous assumption that the State can not have such a degree of interest in the object for which property is condemned as properly to grant the power of condemnation, and at the same time leave to those condemning and paying for it, whether natural persons or corporations, such an ownership of the property as will entitle them to a reasonable compensation for its use as a matter of constitutional right.

There are about three thousand five hundred millions of money invested in railroads in this country, and we respectfully submit that a better reason must be found for permitting this proporty or its income to be arbitrarily seized, without compensation, by the several States in which it lies, than the fact that the companies which have invested this vast sum in works of public utility have been authorized to condemn the land upon which the roads are built, by paying its full value to the owners, or the other fact that the roads, when

built, are public highways, in the sense that the public has a right to be carried upon them. On a question involving such momentous consequences we should speak, at least in courts, with accuracy, and recognize the fact that the public interest which will authorize an exercise of the right of eminent domain is not necessarily an exclusive interest, but may co-exist with a private ownership that places the property and its income beyond the reach of legislative invasion.

In the cases of the State Freight Tax, 15 Wallace, 233, and Olcott vs. Supervisors, 16 *ibid*, 688, this Court, in a few words, recognized the exact distinction of which I have been speaking. Both cases were decided at the same term, and the opinion of the Court, in both cases, was given by the same learned Judge. In the case first cited, the Court spoke of railways as public highways, and said, "though the owner-"ship is private the use is public." In the other case, the Court spoke as follows:

"We concede the right and power of the State to tax the "franchises of its corporations, and the right of the owners "of artificial highways, whether such owners be the State or "grantees of franchises from the State, to exact what they "please for the use of their ways. That right is an attribute "of ownership."

In another part of the same opinion the Court says:

"But, in truth, the State has no more right to demand a "portion of the tolls which the grantees of her franchises

"may exact, than she would have to demand a portion of the "rents of land which she had sold. She may tax by virtue "of her sovereignty, and measure the tax by income; but "the income itself is beyond her reach.

In the recent case of Minot vs. P., W. & B. R. R. Co., 18 Wall., 206, this Court, speaking in reference to railway charters, says "that the charter of a private corporation is a contract "between the State and the corporation, and within the pro- "visions of the Constitution prohibiting legislation impairing "the obligation of contracts, has been the settled law of this "Court since the decision in the Dartmouth College case. "Nor does it make any difference that the uses of the corpor- "ation are public, if the corporation itself be private. The "contract is equally protected from legislative interference, "whether the public be interested in the exercise of its fran- "chise, or the charter be granted for the sole benefit of its "corporators."

I submit that the language of these cases is virtually decisive of the case at bar.

This question has been placed in a clear light by a recent opinion of the Court of Appeals of the State of New York, in the case of The People vs. Batchelor, 53 N. Y., 139. We take the following extract from the opinion:

"It has been uniformly held that the right of eminent "domain may be exercised so far, in behalf of a railroad "corporation, as is necesaary for the construction and opera-

"tion of the road, upon the ground that the road and its "operation were for a public purpose, and, therefore, the real "estate condemned for its use was taken for public and not "private use. But it is equally clear that property acquired "by the corporation belongs to it exclusively, and its owner- "ship is as absolute as that of any private individual of prop- "erty belonging to him. It is also clear that, so far as the "road is operated for the benefit of its stockholders, the cor- "poration is private. We have, then, an artificial being, "created by the Legislature, endowed with public franchises, "the absolute owner of property, of which it can not be "deprived by legislation, except for public purposes, and "carrying on business for the private emolument of its stock- "holders."

This precise question has recently received a very clear exposition by the Court of Appeals of Delaware, in the case of the Philadelphia, Wilmington & Baltimore Railroad Co. vs. Bower. The case is reported in the March number of the *Law Register*, 1874. The Legislature of Delaware had passed an act prohibiting railway companies from charging greater rates of freight or fare within than they did without the State. The question was as to the validity of the act. The Court held the act a violation of the charter, and therefore void. The opinion is very clear, and we make from it the following extract:

"There are, also, *mutual obligations* implicitly assumed by "the parties—the Government becoming bound, on the one "hand, for the secure enjoyment by the grantees of the cor-

"porate franchise, according to the terms and conditions of "the charter; and the corporators, on the other hand, under- "taking, in consideration of the privileges bestowed, to exercise "them faithfully for the purposes contemplated in the grant "of them. Further, the business conducted under such char- "ters, quite as much as like enterprises set on foot by persons "unincorporated, is provided for by private capital invested "by the corporators for their individual profit, and *the prop- "erty held and employed by the corporation belongs to the cor- "porators.* The State takes no part in the outlay or profits "of the enterprise, and holds no interest whatever in the "corporate property or effects, except in some special instances "in which the State becomes a stockholder. The corporate "franchise itself, although created by the Legislature, "becomes, when vested by due acts of acceptance, a species of "private property, and is recognized and protected at common "law as fully as any other kind of property. The interest "which the public have in the objects and operations of these "business corporations is purely incidental, and in no degree "detracts from the private nature of the corporation and of "its franchises."

In the case of The People vs. Salem, 20 Mich., 477, the Court, speaking through Mr. Justice Cooley, says:

"The road, when constructed, is nevertheless private prop- "erty, owned, controlled and operated by a private corpora- "tion for the benefit of its own members, and to be subject to "the supervision and control of the State only as other private "property." And on the next page we find this further

language: "They are private property whose owners make "it their business to transport persons and merchandise in "their own carriages, over their own land, for such pecuniary "compensation as may be stipulated."

That railway companies are private corporations, is also held in the following cases, and many more might be cited:

Tinsman vs. Belv. & Del. R. R. Co., 2 Dutch., 148.

Dearborn vs. Boston & Mont. R. R., 4 Foster, 179.

Thorpe vs. R. & B. R. R. Co., 27 Vt., 140.

Bailey vs. P. W. & B. R. R. Co., 4 Harr., 389.

Presbyterian Society vs. A. & R. R. R. Co., 3 Hill., 567.

Undoubtedly, every State in the Union exercises the right of taxation over all railways within its borders, where they are not exempted by special provisions of their charter, and this right is exercised not only by the State itself, but by the counties and towns which the roads traverse. In Minnesota, as in most of the States, railway companies are taxed and must pay, whether the stockholders have received a dollar of dividend or not. Yet this taxation is wrong, and must be abandoned, if railways are mere instruments of government, and the companies mere public corporations, like the counties and towns which tax them.

Within a very recent period, there has occasionally been shown, in some of the State courts, a disposition to challenge the decision in the Dartmouth College case, or at least the extent to which it has been applied in the protection of certain classes of private corporations. Thus in a case decided by

the Supreme Court of Wisconsin, at their June term, 1874, Mr. Chief Justice Ryan, in an opinion certainly able, elaborate and learned, but marked by a spirit of sympathy with the anti-railway legislation of the West, while compelled to admit that railway corporations fall within the rule of the Dartmouth College case, nevertheless bemoans the fact that he sits *in vinculis* under the majestic authority of this tribunal. But while peculiar external circumstances, or peculiar mental characteristics, may sometimes draw such casual expressions from judges and lawyers, all persons who believe in the sacredness of private rights against popular aggression must feel profoundly thankful to the great men who pronounced that judgment, and to their successors upon this bench who have so unflinchingly applied it. This Court, in the recent case of the Binghampton Bridge, 3 Wallace, 51, has itself vigorously expressed its appreciation of that case, as follows:

"We have supposed, if any thing was settled by an un-
"broken course of decisions in the Federal and State Courts,
"it was that an act of incorporation was a contract between
"the State and the stockholders. All Courts, at this day,
"are estopped from questioning the doctrine. The security
"of property rests upon it; and every successful enterprise is
"undertaken in the unshaken belief that it will never be
"forsaken. A departure from it now would involve dangers
"to society that cannot be foreseen — would shock the sense
"of justice of the country, unhinge its business interests, and
"weaken, if not destroy, that respect which has always been
"felt for the judicial department of the country."

vert to a claim sometimes made by the advocates of the kind of legislation under discussion, that it is valid as an exercise of the "police power" of the State. This phrase is one of those forms of expression under which it is often convenient to cloak legislative invasion of private right. But the police power is simply the right of the State to require all persons to so conduct themselves, manage their property, and transact their business, as not to injure others. Its functions are admirably expressed and its limits defined by the Court of Appeals of Delaware, in the case of the P. W. & B. Railroad vs. Bower, already cited from the *Law Register*, and the following extract from that opinion clearly shows how frivolous is the effort to justify this species of legislation as an exercise of this power:

"The police power of the State comprehends all those general laws of internal regulation which are necessary to "secure the peace, good order, health and comfort of society. "We are now concerned, not so much to discuss this power at "large, as to ascertain, with sufficient precision for the case "before us, what is the proper limit of the State police power "in its bearing upon chartered rights and privileges, as these "are protected by the Constitution of the United States. It is "not difficult to ascertain a rule sufficiently definite to be readily "applied to cases, and one securing all interests involved, "saving to the State, on the one hand, all needful authority "for the legitimate purposes of police regulation, and yet, on "the other hand, not trenching upon the constitutional protection of chartered rights. Such a rule would seem to be "this: that the Legislature may at all times regulate the ex-

"ercise of the corporate franchise by general laws passed in "good faith for the legitimate ends contemplated by the State "police power—that is for the peace, good order, health, com- "fort, and welfare of society—but that it cannot, under color of "such laws, destroy or impair the franchise itself, nor any of "those rights or powers which are essential to its beneficial "exercise. Thus, acts regulating the mode of carriage of "passengers with a view to their safety, or regulating the "speed of travel through towns or cities, or prescribing certain "precautions for the public safety at crossings, or requiring "the erection of fences, etc., etc., are proper exercises of the "power of police regulation. Such acts leave the franchise "unimpaired and simply regulate the exercise of it in some "particulars plainly essential to the general safety, health or "comfort of society. But quite different are acts which di- "rectly touch the constitution of the corporation, or abridge or "modify any of those corporate powers which are essential to "the very ends of its creation; such powers, for example, as "the right to operate a railroad at all, the right to take tolls, "or fares and freights, or to adjust their tariff of such charges. "These are not police regulations, but are in substance and "effect amendments of the charter; and it is most obvious "that if, under color of the police power, corporations may be "thus dealt with, the constitutional provision so solemnly ad- "judged by the Supreme Court to be a protection to their "rights, is, after all, as to them, wholly nugatory."

II.

I have discussed, at perhaps needless length, the first question presented by this record—the question whether railway charters are contracts, inviolable by the legislative power.

The second question is whether, in the absence of any express grant, in the charter, of a power to demand compensation for transporting passengers and freight, such power is not clearly implied, and as much beyond legislative infraction as if it had been expressly granted.

The ordinary provision of railway charters is that the corporations may regulate freights and fares at their discretion. Where there is no such express grant, and the charter is wholly silent on this subject, I maintain that there is necessarily implied a grant of power to charge reasonable rates, and this power or right the Legislature can not with draw or impair.

Kent says, in the 2d Commentaries, 298: "The modern "doctrine is to consider corporations as having such powers "as are specifically granted by the act of incorporation, or as "are necessary for the purpose of carrying into effect the "powers expressly granted, and as not having any other."

Chief Justice Marshall, in the Dartmouth College case, said: "A corporation is an artificial being, invisible, intangi- "ble, and existing only in contemplation of law. Being the "mere creature of law, it possesses only those properties which "the charter of its creation confers upon it, either expressly "or as incidental to its very existence. *Those are such as* "*are supposed best calculated to effect the object for which it* "*was created.*" (The italics are mine.)

A corporation created for one purpose can not use its corporate existence in order to accomplish an entirely different

purpose. A corporation chartered to build a railroad can not engage in the business of banking. As said by this Court in Beaty vs. Knowler, 4 Pet., 162, the corporate powers "can "not be extended beyond the letter and spirit of the act of "incorporation." But, while a charter can not be perverted to uses not contemplated by the Legislature, the corporation takes, without express grant, all powers necessary to carry into effect those expressly granted—or, in other words, all powers necessary to enable it to accomplish the purposes of its creation.

Thus, in the case of The Enfield Bridge Company vs. The H. & N. H. R. R. Co., 17 Conn., 642, the charter of the railway company did not expressly authorize the railroad company to condemn incorporeal property, but only to condemn land. Nevertheless, the Court held that it had the power to condemn incorporeal property, as a necessary incident to the object of its creation.

This is the language of the Court:

"It is still insisted that the charter of the railroad company "does not authorize an encroachment upon this species of "incorporeal property. The charters of both the Hartford "& New Haven and the Hartford & Springfield railroads "expressly give to the respective companies 'all powers, "'privileges and immunities which are or may be necessary "'to carry into effect the purposes and objects of the act.' "And we here repeat what we said when this case, on a "former occasion, was before us: 'When such stipulations "'are made, it becomes the duty of the Court to give them

The second question is whether, in the absence of any express grant, in the charter, of a power to demand compensation for transporting passengers and freight, such power is not clearly implied, and as much beyond legislative infraction as if it had been expressly granted.

The ordinary provision of railway charters is that the corporations may regulate freights and fares at their discretion. Where there is no such express grant, and the charter is wholly silent on this subject, I maintain that there is necessarily implied a grant of power to charge reasonable rates, and this power or right the Legislature can not with draw or impair.

Kent says, in the 2d Commentaries, 298: "The modern "doctrine is to consider corporations as having such powers "as are specifically granted by the act of incorporation, or as "are necessary for the purpose of carrying into effect the "powers expressly granted, and as not having any other."

Chief Justice Marshall, in the Dartmouth College case, said: "A corporation is an artificial being, invisible, intangi- "ble, and existing only in contemplation of law. Being the "mere creature of law, it possesses only those properties which "the charter of its creation confers upon it, either expressly "or as incidental to its very existence. *Those are such as* "*are supposed best calculated to effect the object for which it* "*was created.*" (The italics are mine.)

A corporation created for one purpose can not use its corporate existence in order to accomplish an entirely different

purpose. A corporation chartered to build a railroad can not engage in the business of banking. As said by this Court in Beaty vs. Knowler, 4 Pet., 162, the corporate powers "can "not be extended beyond the letter and spirit of the act of "incorporation." But, while a charter can not be perverted to uses not contemplated by the Legislature, the corporation takes, without express grant, all powers necessary to carry into effect those expressly granted—or, in other words, all powers necessary to enable it to accomplish the purposes of its creation.

Thus, in the case of The Enfield Bridge Company vs. The H. & N. H. R. R. Co., 17 Conn., 642, the charter of the railway company did not expressly authorize the railroad company to condemn incorporeal property, but only to condemn land. Nevertheless, the Court held that it had the power to condemn incorporeal property, as a necessary incident to the object of its creation.

This is the language of the Court:

"It is still insisted that the charter of the railroad company "does not authorize an encroachment upon this species of "incorporeal property. The charters of both the Hartford "& New Haven and the Hartford & Springfield railroads "expressly give to the respective companies 'all powers, "'privileges and immunities which are or may be necessary "'to carry into effect the purposes and objects of the act.' "And we here repeat what we said when this case, on a "former occasion, was before us: 'When such stipulations "'are made, it becomes the duty of the Court to give them

"'such construction as will give them full effect.' This can "be done only by so treating the powers of the railroad "company as that it shall have the right, in a constitutional "manner, to sequester both land and water, to take property "both corporeal and incorporeal, or to interfere with privileges "which may lie in the way, for the necessary completion of "the work which it was empowered to constitute; and the "entire language of both charters must be read with an eye "to this object. (Ellis vs. Welch, 6 Mass., R. 246; Parks "vs. Norton, 15 Pick., 203; Boston Water Power Co. vs. "Boston & Worcester Railroad Co., 23 Pick., 360.) So to "limit the interpretation of these charters, in this particular, "as the plaintiffs claim, would defeat the entire purpose of "the Legislature and of the railroad company. It was known "that a railroad could not be constructed in this cultivated, "improved and populated section of country, for any consid- "erable distance, without encroaching somewhat upon turn- "pikes, ferries, fisheries, and public and private rights of way; "and we must suppose that the Legislature, when it gave the "right to take land, intended, by the language it used, to "confer also the power to interfere with all franchises appur- "tenant thereto, upon payment of just compensation there- "for."

This is, in substance, the language of all Courts and text-writers that have treated upon this subject.

The object in creating a railway company is not merely to construct a road-bed and lay the ties and iron, but also to furnish to the public locomotives and cars adapted to the transportation of both passengers and freight, with trained

and skilled servants to manage them, and with every appliance that science and art can devise to secure speed and safety. If the company fails to furnish any of these things, and injury ensues as a consequence of such neglect, it must respond in damages. After having expended millions in the construction of its line, if it fails to transport goods or passengers demanding transportation, it must pay the resulting losses, and its charter may be taken away. How can it perform these duties? How can it fulfill the object of its creation? Manifestly only by charging a reasonable compensation for the services it is required to render. To say that it has not as clear a legal right to do this as if that right had been in terms given in the charter, is a proposition so utterly unreasonable that it is difficult to speak of it without contempt.

It is possible that counsel for defendant in error may cite the case of Perine vs. Chesapeake & Delaware Canal Co., 9 Howard, 177, as bearing upon this question; but, in fact, there is no analogy. In that case, the three States of Maryland, Delaware and Pennsylvania had united in granting a charter to a company organized to construct a canal connecting the waters of the Chesapeake and Delaware bays. The charter provided that the canal should "forever there-"after be esteemed and taken to be navigable as a public "highway, free for the transportation of all goods, commodi-"ties, or produce whatsoever, on payment of the toll imposed "by this act." The charter also specified the precise sum which the company might charge as toll upon the various articles of commerce, and upon vessels carrying no freight; but gave no additional toll upon vessels simply because of the

passengers on board. The question before the Court was, whether the company could charge toll on account of passengers, beyond the toll demandable upon vessels carrying freight or upon empty vessels? The Court held, as a matter of construction of the charter, that the corporation could charge no tolls upon passengers, three Judges dissenting.

There is no analogy between that case and the one at bar. A canal is simply an artificial river, on which all persons can send their own vessels, subject only to the payment of the tolls at the locks. The company owning the canal is not a common carrier. It transports neither goods nor passengers. It simply furnishes a water-course, which, by the charter in the case in 9th Howard, was declared free to all the world, upon the payment of the tolls specified with minute particularity in the act. In accepting the charter, the company agreed to charge no more than the amount therein specified. The company was to be paid at that rate for having constructed a water-course open to all comers. This was strictly toll. It was fixed by charter, and the Court decided that no toll could be charged except in the cases enumerated by the charter, because the charter provided that the canal was to be free to all persons "on payment of the toll imposed by this act."

What has been said of the case in 9th Howard is true of the case of Stonebridge Canal Co. v. Wheely, 2 Bard & Ad., 793, which may be cited by opposing counsel. There the act of Parliament, or charter of the company, provided that the canal should be free to all persons to navigate, subject to the payment of certain tolls on passing the locks; and the Court held, as a construction of the charter, that Parliament did not

intend toll should be charged against boats not passing a lock. This was on the ground that, by the charter, the right was reserved to the public to navigate the canal free of toll, except at the locks; and the Court seems to concede, that if the public had no such right by the charter the company might insist on compensation. There are several English cases of the same character, in which the decision involves simply a construction of the charter.

The term toll is often, for convenience, applied to railway charges, but inaccurately so applied. A railway corporation does not charge other persons for permitting them to send their own vehicles over the road. It charges for carrying them or their goods in vehicles which the corporation owns, and for which it furnishes the motive power. No vehicles but their own have a right to be upon their road, and persons taking them there are trespassers. To pretend that there is any analogy between a railway company whose charter is entirely silent on the question of compensation for services rendered, and a canal company situated as was the company in the case in 9th Howard, where the charter provided that the canal should be forever free, except as to the payment of the tolls specifically fixed by the charter, is but an idle fantasy, which seeks an analogy where none exists. But, notwithstanding the essential difference between a railroad and a canal, it is evident, from the opinion in the case in 9th Howard, that even in that case the canal company would have been allowed to charge a reasonable toll, if the charter had not specifically regulated the tolls, and in exclusive terms.

Suppose the plaintiff in error had been requested by a

person living at one of its termini to transport a hundred tons of freight over its road, and had done so without any contract as to the rate of charge. Having delivered the freight at its destination, the company demands a reasonable compensation. The shipper refuses to pay, on the ground that the charter of the company does not authorize it to demand compensation. The company brings suit. Is there a Court in the civilized world that would say it was not entitled to recover? And if it would be so entitled, what would be the ground? One ground, and a sufficient one, would be, that it had a legal right, arising by absolute necessity, from the charter which created it, to receive a reasonable compensation for the services it had performed at the request of the defendant. And if it has such a legal right, would the right be any more legal, or more fixed, or more indestructible, by the Legislature, than if it rested upon an express grant of power to charge compensation for services?

But let me go further. Suppose the shipper, instead of making no contract, does make a positive contract to pay a certain sum for the carriage of his hundred tons of freight. The freight is delivered, and he refuses payment. The company sues, and the shipper defends upon the ground that the company had no right to charge compensation — that the contract made was *ultra vires* on the part of the company, and void. If the shipper could successfully defend where there was no express contract to pay, he could do so equally when there was. The express would be no more binding than the implied agreement.

I submit to the Court that hardly any legal proposition can

be plainer than this: that a railway corporation, whose charter is entirely silent on the subject of compensation for services to be rendered, has a legal right to a reasonable compensation, as the indispensable means of enabling it to accomplish the object of its creation.

If, then, as I think I have shown, there is an implied grant in the charter of this company of the right to charge reasonable rates of fare and freight, is that right any less secured by the Constitution of the United States than it would be if it had been granted by the charter in express terms?

There is no difficulty in this question. The right implied in a contract, when it is once admitted to be implied, is equally sacred as if it were created by express terms. The only inquiry is, does the charter create the right either by express terms or by necessary implication? If it does, then the right is protected by the Constitution of the United States against State infringement.

This has been so well expressed by the former Supreme Court of New York, in the case of The People vs. Manhattan Company, 9 Wend., 392, that I will content myself by quoting the following language from the opinion:

"Nothing has been considered better settled than that the "rights and privileges conferred by these acts of incorporation "or charters were held by the sacred obligation of a contract "between the public and those on whom they were conferred, "and that any attempt on the part of the Legislature to repeal, "or to alter or modify any of their essential provisions, would "be unconstitutional, as interfering with vested rights and "violating the obligation of a contract. I am not aware that

"there has ever been any difference of opinion upon this sub-
"ject among enlightened men, whether lawyers or not. The
"doctrine has been sanctioned again and again in the Supreme
"Court of the United States, and in most of the State Courts
"of the Union. It seemed to be supposed by one of the
"counsel for the people that this doctrine was applicable only
"to those powers which were expressly conferred by a charter,
"(in relation to which he freely admitted it,) but that it was
"not true in relation to implied powers, which were not
"necessary to the existence of the corporation. It may be,
"and undoubtedly frequently is, difficult precisely and satis-
"factorily to determine the nature and extent of the powers
"intended to be conferred by the general and comprehensive
"terms sometimes employed in a charter after the enumeration
"of specific powers; but when that difficulty is surmounted,
"and those powers are ascertained, by the application of those
"legal rules which regulate and control the construction of
"such instruments, *it strikes me as a legal anomaly to contend*
"*that they are held by a different and less sacred tenure than*
"*those which are expressly given.* Corporations are the crea-
"tures of the Legislature. It gives or withholds such powers
"as it pleases; but whatever it gives, either expressly or accord-
"ing to the legal construction of the terms employed by it,
"it has not the constitutional right to withdraw or essentially
"to modify or impair, although it may, to a certain extent,
"undoubtedly regulate the manner in which such powers are
"to be exercised."

III.

My third proposition is that, independently of the implied grant of power, the right to demand reasonable compensation

for the use of its property belongs to the company, as an attribute of ownership, and as an incident to its corporate existence. Therefore, the act in question, which deprives the plaintiff in error of the right to demand such reasonable compensation, violates the 14th amendment of the Constitution of the United States, which provides that "no State shall "deprive any person of life, liberty or property without due "process of law, nor deny to any person within its jurisdiction "the equal protection of the laws." An act which deprives a railway company of the right to demand a reasonable compensation for the use of its property and the services of its agents, deprives it of its property "without due process of "law," and denies to it "the equal protection of the laws."

The right of a person, whether natural or artificial, to demand a reasonable compensation for property or services furnished to another, at his request, is a natural right resting on universal law. It no more needs a statutory enactment to support it than does the right of a natural person to protect himself, or of a corporation to protect its property, against acts of violence. Create the corporation, and this right to compensation for services or property is created; and unless the charter otherwise provides, the corporation thenceforth holds the right by the same firm tenure by which natural persons hold the same right.

This right is sometimes spoken of as a corporate franchise, where there has been no occasion to define it with accuracy. It is only a corporate franchise in the sense that it is exercised by a corporation; and whatever a corporation does, it does in its corporate capacity, as it has no other. The right of a

railway company to charge freight and fare may, therefore, be called a corporate right or franchise, inasmuch as it is a right exercised by a corporation, whose very existence is a franchise; but, the corporation being once created, it possesses this right by the general law.

This position was expressly laid down by this Court. in the case of the State Freight Tax, 15 Wallace, 233, already quoted, in which the following language was used:

"We concede the right and power of the State to tax the "franchises of its corporations, and the right of the owners "of artificial highways, whether such owners be the State or "the grantees of franchises from the State, to *exact what they* "*please for the use of their ways. That right is an attribute* "*of ownership.*"

To say that a railway corporation, in demanding compensation for carrying goods or passengers, is exercising a right which rests upon legislative grant, is an entire misapprehension of the nature of a franchise. A franchise is a special privilege, not belonging to the community at large, and given by the sovereign power. The power given to a combination of natural persons, to do business as a corporation, is, therefore, a franchise. The power of condemning land under the right of eminent domain is a franchise. But the power of a corporation to demand payment for services rendered by it, at the request of another person, is not, in any proper sense, a franchise. A corporation, in paying a debt, necessarily does so in its corporate capacity; and, therefore, in loose language,

such as we sometimes find in the books, it may be said, in paying it, to be exercising a corporate right or franchise. Yet, it is certainly not exercising a right or franchise derived from its charter. Municipal corporations are under the control of the Legislature. Their charters may be taken away or amended at legislative discretion. Yet, this Court held, in Van Hoffman vs. Quincy, 4 Wall., 535, that an act of the Legislature of Illinois which amended the charter of the city of Quincy, by limiting its power to levy taxes, was void, when it was shown that the result of the act would incapacitate the city to pay its debts. This decision did not proceed upon the ground that the right to pay its debts was a corporate franchise of the city, because the corporation was municipal, and its franchises were under legislative control; but upon the ground that the payment of debts was a duty arising under the general law of the land in regard to the obligation of contracts, from which the Legislature could not relieve the city by amending its charter.

Now, the right of a corporation to pay a debt is no more a right existing independently of a legislative grant of such power, than is the right of a corporation to receive payment of a debt due to it for services it has rendered.

Suppose a company of persons to be incorporated to manufacture cloth, and the charter to be silent as to their right to demand payment for their services. A farmer takes his wool to the mill, and has it made into cloth. Would any sane person pretend that the corporation could not insist on payment for its services before it gave up the cloth?

Or, to take an illustration still more germane, suppose the Legislature of Minnesota had incorporated a company for steam navigation on the Mississippi. Would any sane person say that the company could charge neither fare for passengers nor freight for goods, because the charter gave no express power to do so?

My position in this branch of the argument is this: I maintain, first, that the right of a railway company to charge a reasonable compensation for services rendered is a right as plainly granted, by implication, in its charter, as if it had been granted in express terms, because absolutely indispensable to the existence of the corporation. This was discussed under the second head of my argument. I maintain, also, that, independently of this implied grant, this right exists by virtue of the general law, to the same extent that it exists on the part of private persons. To the extent to which the corporation is authorized to do business at all, to that extent it has the right, by the general law, to make payment for services it receives, and to receive payment for services it renders. In the language of this Court, this is "an attribute of owner-"ship." As soon as the corporation was called into existence this right attached to it; and an act which attempts to take it away is not only a violation of its charter, regarded as a contract, but a violation of the property rights of the corporators, as secured by the constitutional amendment above quoted.

Under the proposition discussed under the second head—that the grant of this right is implied in the charter—it is immaterial whether the Legislature could arbitrarily fix the

rates at which natural persons, exercising the vocation of common carriers upon highways and rivers, should receive compensation for their services.

Under the proposition which I am now discussing, and which claims the right to charge reasonable compensation, not as a franchise granted expressly or impliedly by the charter, but as resting upon the same ground upon which the right rests with natural persons, the question does arise, how far this right with natural persons is independent of legislative aggression.

I can not, however, consider this a question which this Court will desire to have discussed at any length. It is certainly the settled law of this country that legislative power does not extend to the fixing of prices for services or commodities in the private affairs of life.

This proposition rests upon the indisputable truth that if the Legislature can determine at what price the farmer shall sell a bushel of wheat, or the manufacturer a yard of cloth, or at what price the owner of a steamboat or a wagon shall take the wheat and cloth to market, then the Legislature can take away the income which men derive from their labor or their property, and this, in substance, is taking the property itself, and is therefore a violation of the 14th amendment of the Constitution above quoted.

It is not necessary, in this Court, to discuss the meaning of the phrase, "due process of law," as used in that amendment. It has received judicial exposition in almost numberless cases,

and by almost every Court in the Union, and it is now universally conceded that, under the safeguard of those venerable words, all private property is safe against legislative aggression. While authority is unnecessary, the language of Mr. Justice Selden, in Wynehamer vs. The People, 13 N. Y., in regard to this phrase, is so appropriate that I quote it as follows:

"No doubt, it seems to me, can be admitted of the meaning "of these provisions. To say, as has been suggested, that "'the law of the land,' or 'due process of law,' may mean "the very act of legislation which deprives the citizen of his "rights, privileges or property, leads to a simple absurdity. "The Constitution would then mean, that no person shall be "deprived of his property or rights unless the Legislature "shall pass a law to effectuate the wrong, and this would be "throwing the restraint entirely away. The true interpreta- "tion of these constitutional phrases is, that where rights are "acquired by the citizen under the existing law, there is no "power in any branch of the Government to take them away; "but where they are held contrary to the existing law, or are "forfeited by its violation, then they may be taken from "him—not by an act of the Legislature, but in the due "administration of the law itself, before the judicial tribunals "of the State. The cause or occasion for depriving the citi- "zen of his supposed rights must be found in the law as it is, "or, at least, it can not be *created* by a legislative act which "aims at their destruction. Where rights of property are "admitted to exist, the Legislature can not say they shall "exist no longer; nor will it make any difference, although a

"process and a tribunal are appointed to execute the sentence. "If this is the 'law of the land' and 'due process of law,' "within the meaning of the Constitution, then the Legislature "is omnipotent. It may, under the same interpretation, pass "a law to take away liberty or life without a pre-existing "cause, appointing judicial and executive agencies to execute "its will. Property is placed by the Constitution in the same "category with liberty and life."

But it is not merely tangible property that is secured. The income of property is equally so. If the Legislature can limit the price which I am to charge for my labor or the use of my property, and compel me to take a less sum than I would receive but for such interference, it does in substance take the property itself. The constitution which would only protect me in my naked legal title, and not in the use or income, would be but a miserable mockery. This never has been, and probably never will be, held to be the law. On this point, this Court has expressed itself in very vigorous language, in the case of Pumpelly vs. Green Bay Co., 13 Wallace, 66, as follows:

"It would be a very curious and unsatisfactory result, if, "in construing a provision of constitutional law, always under- "stood to have been adopted for protection and security to the "rights of the individual as against the Government, and which "has received the commendation of jurists, statesmen and "commentators, as placing the just principles of the common "law on that subject beyond the power of ordinary legislation "to control them, it shall be held that, if the Government "refrains from the absolute conversion of real property to the

"uses of the public, it can destroy its value entirely—can "inflict irreparable and permanent injury to any extent— "can, in effect, subject it to total destruction, because, in the "narrowest sense of that word, it is not *taken* for public use. "Such a construction would pervert the constitutional pro- "vision into a restriction upon the rights of the citizen, as "those rights stood at the common law, instead of the Govern- "ment, and make it an authority for the invasion of private "right, under the pretext of the public good, which had no "warrant in the laws or practices of our ancestors."

In the celebrated case of Green vs. Biddle, 8 Wheaton, 355, this Court said:

"Nothing, in short, can be more clear, upon principles of "law and reason, than that a law which denies to the owner "of land a remedy to recover the possession of it, when "withheld by any person, however innocently he may have "obtained it; or to recover the profits received from it by "the occupant; or which clogs his recovery of such possession "and profits by conditions and restrictions tending to diminish "the value and amount of the thing recovered, impairs his "right to and interest in the property. If there be no "remedy to recover the possession, the law necessarily pre- "sumes a want of right to it. If the remedy afforded be "qualified and restrained by conditions of any kind, the right "of the owner may indeed subsist, and be acknowledged, but "it is impaired and rendered insecure, according to the nature "and extent of such restrictions. A right to land essentially "implies a right to the profits accruing from it, since without "the latter the former can be of no value. Thus, a devise of

"the profits of land, or even a grant of them, will pass a "right to the land itself. Shep. Touch., 93; Co. Litt., 4. "'For what,' says Lord Coke, in this page, 'is the land but "'the profits thereof?'"

The wholesome language of these cases shows that in this Court it is not necessary to argue that a legislative act which seeks to limit the price of labor, or the income of property, is as unconstitutional as would be an act which sought to limit the price at which the property itself should be sold, or to take the labor or property of one person for the benefit of another, or for the public benefit, without compensation.

It is sometimes said that the regulation by cities of the charges of hackmen is an exercise of this power, the existence of which I deny. But this is a mistaken view. Hackmen require the use of the streets as a standing place for their carriages. The city, in the exercise of its police power, grants them this right, and issues the required license. But one of the terms is, that they shall submit to the regulations of the city as to prices. They accept the license subject to the condition upon which it is granted. There is, therefore, no analogy between this power and that under discussion.

So, too, it is sometimes said that the State regulates turnpike and ferry tolls. But this power is always reserved, expressly or by implication, either in the special act creating the franchise, or by some general law in force when the franchise is granted, and controlling its exercise. I have not been able to find a case in which this power has been exercised of which the assertion just made is not true.

It is sometimes said that the tolls of mills are regulated by statute. This can only be done where millers are authorized to overflow neighboring lands in securing the necessary water power — a common species of legislation before the days of steam — and the general law authorizing the overflow fixes, or reserves the right to fix, the tolls. But if a person erects a steam mill on his own land, and offers to grind wheat for the public, there is in this country no legislative power to fix his tolls.

These are the only instances I have ever heard cited in which a legislative control over prices has been sanctioned; and there is no analogy between them and an act determining railway freights, where there has been no reservation of such power on the part of the State, either by the terms of the charter or by force of some general law existing when the charter was granted.

The pretense that the Legislature, in the absence of such reservation, can regulate the price of commodities, simply because they are manufactured by a corporation to which the State has granted special privileges, is too absurd for argument in this Court. And if the Legislature can not control one corporation as to the rates at which it shall manufacture its cloth, it is difficult to understand upon what ground it can control another corporation as to the rates at which it shall take the cloth to market.

IV.

My fourth proposition is, that the right to charge a reasonable compensation being implied in the charter, and existing

by the general law as an attribute of ownership and an incident to the performance of corporate services, the question of what is a reasonable compensation is a purely judicial question not to be decided by the Legislature. Its determination belongs to the Courts, where the company can justify its charges by proper evidence and be heard in its own defence.

This proposition seems so plain as hardly to admit of denial. What would be a reasonable rate of freight is a question to be answered only by an inquiry into many facts. The elements which enter into the determination of the question are also constantly changing. What is reasonable to-day may be far otherwise in six months from to-day. The price of labor, the cost of fuel, the amount of business, the condition of the currency—all these, and many other things, enter into the question of reasonableness or unreasonableness. The cost of the road is certainly an important factor in the problem, since the stockholders are entitled to some return on their investment. One road may have cost $30,000 a mile and another $50,000. One may have abundant fuel along its line, another may be obliged to use coal that has been brought hundreds of miles. That the Legislature should undertake to determine all these questions in advance, and by an unbending rule applicable to all roads and under all circumstances, is an absurdity. The question to be decided is one vitally affecting the property of the corporation, and certainly it has the right to be heard before it is despoiled. It was to secure a hearing before property can be taken, and a hearing in an impartial court of justice administering the general law, that our ancestors inserted in Magna Charta that famous safeguard as to

trial by jury and due process of law, which we have been so careful to preserve in our American Constitutions.

That the determination of what is a reasonable compensation is a judicial question, is decided by the Court of Appeals of Delaware, in the case which we have already several times cited, from the March number, 1874, of the *Law Register*.

We quote the following:

"The Attorney General, who appeared on behalf of the "State, put, in the strongest possible form, the argument in "support of this act, as an exercise of internal regulation, by "insisting that there must, at all times, inhere in the Legisla- "ture an authority to protect the public against extortionate "charges and unjust discriminations by carriers exercising a "public employment, and that to this power railroad corpora- "tions, as well as other common carriers, must be held "amenable. That the Legislature possesses the general power "here claimed for it, is not doubted; but the real question "still remains, viz: In what mode may such power be con- "stitutionally exercised, at least over corporations? The "answer is, that the Legislature may, by general laws, forbid "extortion and unjust discriminations on the part of common "carriers, as it may prohibit any other offense against social "order or the general welfare. It was not disputed, in the "argument, that, for the breach of such laws, corporations, as "well as natural persons, may be held liable; but such lia- "bility would be enforced by a judicial proceeding, in which "the alleged extortionate or unjustly discriminating character "of the charges drawn into the question would be judicially

"ascertained. Such remedies against common carriers already "exist at the common law, and to these, as well as to the "common law liabilities of common carriers generally, incor- "porated carriers, as well as natural persons, are subject by "the public nature of their employment. Very different, "however, from such a mode of regulation by general laws, "with a liability to judicial remedy, is the attempt by a "Legislature to prescribe in advance a law of charges for "carriers—to do which is, in effect, to take out of their "hands the management of their own business."

The case of The Commonwealth vs. Proprietors of New Bedford Bridge, 2 Gray, 337, is also directly in point.

In that case, the charter of the bridge company required it to construct in the bridge "two suitable draws, which shall "be at least thirty feet wide." A subsequent act of the Legislature required the company to construct a draw not less than sixty feet wide, and in a manner to be approved by a commissioner to be appointed by the Governor. The company declined to obey the act, insisting that it was unconstitutional; and the question was brought before the Courts. It was contended for the State that the Legislature could determine what was a "suitable draw," as it is now contended that the Legislature of Minnesota may determine what is a "reasonable compensation." The opinion of the Court upon this point is so clear and conclusive, that I will give a considerable extract from it, commencing on page 349:

"But it is urged—and this constitutes the stress of the "argument on this part of the case—that the use of the term

" 'suitable' in the act incorporating the defendants, as applied " to the construction of the draws, being a term in its nature " indefinite and uncertain, did not fix and absolutely settle " the duty and obligation of the defendants in this particular; " that these, with the exception of the minimum width of the " draw, were thereby left open and undetermined; and by " necessary implication the Legislature have the right reserved " to them of regulating, from time to time, the construction " of the draws, and of prescribing what shall be suitable, as " respects their location, materials and dimensions. But we " can not yield to the force of this argument. It is founded " on an entire misapprehension of the relations of the parties, " as created by the act of incorporation. They are but parties " to a contract. Each has equal rights and privileges under " it, and neither can interpret its terms authoritatively, so as " to control and bind the rights of the other. The Common- " wealth has no more power or authority, to construe the " charter, than the corporation. By becoming a party to a " contract with its citizens, the Government divests itself of " its sovereignty, with respect to the terms and conditions of " the compact, and its construction and interpretation, and " stands in the same position as a private individual. If it " were otherwise, the rights of parties contracting with the " Government would be held at the caprice of the sovereign, " and exposed to all the risks arising from the corrupt or " ill-judged use of misguided power. The interpretation and " construction of contracts, when drawn in question between " the parties, belongs exclusively to the judicial department " of the Government. The Legislature have no more power " to construe their own contracts with their citizens than

"those which individuals make with each other. They can "do neither without exercising judicial power, which would "be contrary to the elementary principles of our Govern- "ment, as set forth in the Declaration of Rights, article 30. "No better illustration of the dangerous consequences which "would follow from a different doctrine could be had than is "afforded by the case at bar. If the Legislature have the "power to decide upon the true meaning of the terms of the "contract, and to determine what shall be deemed suitable "in the construction of the bridge and draws, there can be "no limit placed upon the exercise of this power. If they "have the right to prescribe a draw of sixty feet in width, "they may hereafter require the defendants to extend it to "one hundred feet, or to build it across the entire space "between the shore and the adjacent island. So, too, in "regard to the construction of the bridge itself. The act of "incorporation required that it should 'be well built, at least "'twenty-four feet wide, of good and suitable materials.' By "parity of reasoning, it would be competent for the Legisla- "ture to enact that the bridge should be rebuilt one hundred "feet in width, and be constructed of iron. In a word, the "argument leads directly to the conclusion that the Legisla- "ture have the power to annex new and onerous conditions "to the contract at their pleasure, and thus effectually destroy "the value of the franchise granted to the defendants. Such "a doctrine can not be maintained without overthrowing all "the salutary and well established principles applicable to "this species of contract between the Government and its "citizens. For these reasons, we are of opinion that the act "of 1851, c. 318, *ex proprio vigore*, has no binding force upon

" 'suitable' in the act incorporating the defendants, as applied
" to the construction of the draws, being a term in its nature
" indefinite and uncertain, did not fix and absolutely settle
" the duty and obligation of the defendants in this particular;
" that these, with the exception of the minimum width of the
" draw, were thereby left open and undetermined; and by
" necessary implication the Legislature have the right reserved
" to them of regulating, from time to time, the construction
" of the draws, and of prescribing what shall be suitable, as
" respects their location, materials and dimensions. But we
" can not yield to the force of this argument. It is founded
" on an entire misapprehension of the relations of the parties,
" as created by the act of incorporation. They are but parties
" to a contract. Each has equal rights and privileges under
" it, and neither can interpret its terms authoritatively, so as
" to control and bind the rights of the other. The Common-
" wealth has no more power or authority, to construe the
" charter, than the corporation. By becoming a party to a
" contract with its citizens, the Government divests itself of
" its sovereignty, with respect to the terms and conditions of
" the compact, and its construction and interpretation, and
" stands in the same position as a private individual. If it
" were otherwise, the rights of parties contracting with the
" Government would be held at the caprice of the sovereign,
" and exposed to all the risks arising from the corrupt or
" ill-judged use of misguided power. The interpretation and
" construction of contracts, when drawn in question between
" the parties, belongs exclusively to the judicial department
" of the Government. The Legislature have no more power
" to construe their own contracts with their citizens than

"those which individuals make with each other. They can "do neither without exercising judicial power, which would "be contrary to the elementary principles of our Govern- "ment, as set forth in the Declaration of Rights, article 30. "No better illustration of the dangerous consequences which "would follow from a different doctrine could be had than is "afforded by the case at bar. If the Legislature have the "power to decide upon the true meaning of the terms of the "contract, and to determine what shall be deemed suitable "in the construction of the bridge and draws, there can be "no limit placed upon the exercise of this power. If they "have the right to prescribe a draw of sixty feet in width, "they may hereafter require the defendants to extend it to "one hundred feet, or to build it across the entire space "between the shore and the adjacent island. So, too, in "regard to the construction of the bridge itself. The act of "incorporation required that it should 'be well built, at least "'twenty-four feet wide, of good and suitable materials.' By "parity of reasoning, it would be competent for the Legisla- "ture to enact that the bridge should be rebuilt one hundred "feet in width, and be constructed of iron. In a word, the "argument leads directly to the conclusion that the Legisla- "ture have the power to annex new and onerous conditions "to the contract at their pleasure, and thus effectually destroy "the value of the franchise granted to the defendants. Such "a doctrine can not be maintained without overthrowing all "the salutary and well established principles applicable to "this species of contract between the Government and its "citizens. For these reasons, we are of opinion that the act "of 1851, c. 318, *ex proprio vigore*, has no binding force upon

"the defendants, and that this indictment can not be sustained "against them upon proof of a neglect and refusal to comply "with its requisitions." * * * * *

"Whether the defendants have, in fact, complied with the "terms of their charter, by constructing their draws in a "suitable manner, so as not unreasonably or unnecessarily to "obstruct or impede public navigation, is a question which "neither the Legislature nor the defendants can determine "absolutely, without the consent of the other, when it is "drawn in question between the defendants and the Common-"wealth. Like all other matters involving a controversy "concerning public duty and private right, it is to be adjusted "and settled in the regular tribunals where questions of law "and fact are adjudicated on fixed and established principles, "and according to the forms and usages best adapted to "secure the impartial administration of justice."

The same question was adjudged by the Supreme Court of Illinois in the case of The Chicago & Alton R. R. Co. vs. The People, decided at the January term, 1873, and reported in the 5th vol. of Chicago *Legal News*, 266. The case has not yet been reached by the official reporter.

The act before the Court in that case was intended to impose a fine upon any railway guilty of unjust discrimination, and it made the fact that a railway company charged a larger sum for carrying freight any distance than it charged for carrying the same quantity and kind of freight a greater or the same distance, though on another portion of the road, conclusive evidence of unjust discrimination. The Court

held the act void, on the ground that all discriminations were not necessarily unjust, and whether they were, in any given case, reasonable and proper, was a judicial question upon which the railway companies had a right to be heard and to take the verdict of a jury. In giving the opinion the Court used the following language:

"But the act itself goes further. It forbids any discrim-
"ination whatever, under any circumstances, and whether
"just or unjust, in the charges for transporting the same
"classes of freight over equal distances, even though moving
"in opposite directions, and does not permit the companies to
"show that the discrimination is not unjust."

"The mere proof of the discrimination makes out a case
"against the railway companies, which they are not allowed to
"meet by evidence, showing the reason or propriety of the
"discrimination, and then, upon this sort of ex-parte trial,
"the act imposes as a penalty for the offence a forfeiture of
"the franchise, which might be equivalent to a fine of millions
"of dollars. The object of the law is commendable, but such
"a proceeding, to be followed by such a penalty for the first
"offence, can not be sustained. It could only have been au-
"thorized through the inadvertence of the Legislature. The
"law, as it now stands, makes an offence out of an act which
"might be shown not to be an offence, but an exercise of a
"wise discretion, really beneficial to the people of the State,
"and while debarring the companies from all right of explan-
"ation, confiscates their franchises upon the first conviction.
"The Legislature can not raise a conclusive presumption of

"guilt against a natural person from an act that may be inno-
"cent in itself, taking from him the privilege of showing the
"actual innocence or propriety of the act, and confiscating
"his property as a penalty for the supposed offence."

"Those provisions of our Constitution which forbid the
"deprivation of life, liberty or property, except by due pro-
"cess of law, and which guarantee the right of trial by jury
"as heretofore enjoyed, and the right in all criminal prosecu-
"tions to appear and defend in person and by counsel, would
"all be violated by such a law. Those provisions, it is true,
"are designed to apply only to natural persons; but artificial
"persons must be permitted to invoke the spirit of justice
"which prompted them, so far as may be necessary to protect
"their property and franchises against the operation of a law
"that substantially condemns without a trial."

The Court will observe that if the Legislature of Minnesota can be permitted to determine what is a reasonable compensation in this case and fix a maximum, any Legislature in any of the States can do the same thing in regard to any railroad. For it is generally conceded that although charters may give in terms a right to fix rates at discretion, there is, nevertheless, implied in all these charters the common law rule in regard to common carriers, that their charges shall be reasonable and free from unjust discrimination. If this is true, and if a Legislature can determine what is reasonable, it of course follows that it can determine this in regard to all roads without regard to the character of their charters, and thus all the railroads of the United States will

hold their property or its income, subject to legislative discretion. Their charters become practically worthless. Their most important chartered rights vanish before a legislative enactment as to what rate per mile shall be deemed reasonable compensation.

V.

My fifth proposition is, that the act violates that provision of the charter of plaintiff in error which gives the management of the affairs of the company to the board of directors, and in express terms authorizes them "for the purposes "specified in this act to make and establish regulations and "by-laws, and to do all things necessary to be done and not "inconsistent with the Constitution of the United States, or "with the laws of this Territory, or this act."

One of the purposes "specified in the act," was to "main-"tain, use and operate a railroad," and certainly one of the "things necessary to be done" to accomplish this purpose, was the establishment of reasonable rates of compensation for the transportation of passengers and freight. This certainly would not be "inconsistent with the Constitution of "the United States, or with the laws of this Territory, or "this act."

The act under discussion, instead of allowing the directors to do this, declares, in substance, they shall not do it. The State — which is one of the contracting parties — takes back its pledge, on the faith of which the charter was accepted and the road built, and says, in effect, to the corporation, "I will

"manage your affairs, and determine at what compensation "you shall perform your duties. If you do not obey, I will "fine you and take back your franchises."

As remarked by the Delaware Court of Appeals, in the case already so often cited, this is strikingly similar to the New Hampshire act, which this Court held invalid in the Dartmouth College case. The difference is, that, owing to the dissimilarity between the corporations, and the temptation to a Legislature to despoil railway corporations, under the influence of popular passion, the wrong inflicted is vastly greater in cases of this character than it was in the Dartmouth College case. By the act of the New Hampshire Legislature, the administration of the College, by the trustees, was subjected to the supervision of a board of overseers, to be appointed by the Governor and Council, representing the State. The act was admitted to have been passed in good faith, and with a view to enlarge the usefulness of the institution. But this Court said the act took the management of the College from the trustees, to whom it had been confided by the charter, and assumed it for the State. So the act under consideration takes the management of the affairs of this company, in the most vital particular, from the directors, to whom the charter gave it, and assumes it for the State. The analogy is complete; and how one act can be held void and the other valid I can not comprehend.

If the Legislature can pass this act, I am not able to see why it may not assume the management and control of the road in all respects. Why may it not determine who shall be

the superintendent of the road, who the conductors and brakesmen upon the trains, and where the locomotives, cars and fuel shall be bought? The greater includes the less, and if the State can establish the rates of fare and freight it can do these other things, and thus take the entire administration of the road into its hands. If it can establish what the company shall charge, it ought, in justice, to fix a maximum upon the prices it shall *pay* for labor and materials, and compel these to be furnished under penalty of a fine for refusal. There is, indeed, no halting point. This act, in principle, asserts a right on the part of the State to oust the corporation from the management of its entire property and business, and to compel it to perform its duties in a mode which will absolutely annihilate the value of its property.

Under this head of my argument I wish to call the attention of the Court to the act of the Minnesota Legislature, passed February 28, 1866, extending the time for building the road, and providing "that such company shall be bound to convey "freight and passengers upon reasonable terms." Here is an express recognition by the State of the power and right of the company to demand compensation for carrying freight and passengers; and the State, as a condition of extending the time for the completion of the road, insists that the compensation to be charged shall be reasonable. I am not able to see why this is not equivalent to an express grant of power to demand a reasonable compensation. The language used is, indeed, more than an express grant. It imposes, as a duty, upon the company, that it "shall be bound to convey "freight and passengers upon reasonable terms." I need not

dwell upon this point, because no argument can make it plainer. It is only necessary to present it to the Court.

VI.

The act violates in principle the terms of the congressional land grant of the 3d of March, 1857, which required, as one of the conditions of the grant, that the roads receiving its benefit should transport the property or troops of the United States "free from toll or other charges," and should also transport the mails "at such price as Congress may by law "direct."

The Territory of Minnesota desired to obtain a grant of Government land to aid the building of railroads. It obtained it on the above conditions, and by an act passed May 19, 1857, it accepted the grant on these conditions. The Legislature of the State can pass no law violative of these conditions; and yet the act under consideration asserts a power and is founded on a principle completely destructive of the conditions of the congressional grant. It is plain, if the Legislature of Minnesota can determine the precise rate at which this corporation shall perform its duties, or can fix an arbitrary maximum, it can take from the corporation all power to operate the road. It can annihilate it. This act says to the corporation, in effect, "if you do not transport freight and "passengers at the rates fixed by this act, you shall lose your "franchises and cease to exist." It is not in the power of the State to say this, because the corporation owes a duty to the Federal Government which the State can not incapacitate it to perform. The charter in terms imposed that duty upon

the company; and independently of the charter, the terms of the congressional grant would have required it. It is plain that the corporation can not perform this duty to the Government unless it is permitted to charge a reasonable compensation for performing its duties as a common carrier to the people of Minnesota.

Before concluding the argument, I wish briefly to advert to the opinion pronounced in this case by the Supreme Court of Minnesota. The ground upon which the decision is based seems to me remarkable. It is that there is a contract implied in the charter that the company may take "some tolls," but no contract that it may take reasonable tolls, and therefore the Legislature can fix the tolls at its discretion. I copy from the opinion of the Court:

"The contract here, we assume, is that the defendant may "take some tolls. That is what the sovereign granted it. "To the extent to which such a grant necessarily involves "exemption from legislative control, as aforesaid, the sov- "ereign has surrendered such original right of control; no "further. * * * Is an agreement that the defendant "may take some tolls, expressly or by implication, an agree- "ment that the State will never assume to regulate the use "of the franchise and limit the amount of tolls the defendant "may take? This question must be answered in the negative. "The State, we assume, has conferred the right to make some "charge, i. e., to take some toll — not any specified rates of "tolls, nor to take tolls within any specified limits, *nor to take* "*reasonable tolls;* the right it conferred is simply to take "tolls."

I have great respect for the Supreme Court of Minnesota, but I submit that the conclusion here reached, namely, that the company has a vested right under its charter to take "some tolls," but no vested right to take "reasonable tolls," is simply marvellous.

I fear this argument has been too much extended; but the case is one of almost incalculable importance. Of course, if this act of the Minnesota Legislature is valid, the security of railroad property in that or any other State is gone. If the Legislature can fix rates of compensation at all, it can fix them at whatever it may please. The whole question is then remitted to its discretion. If it possesses the power at all, it possesses it absolutely and without supervision, and it can reduce compensation to a rate which would barely pay operating expenses. Nay, it might go further, and reduce to a rate which would not pay operating expenses; and then, having compelled the company to cease the performance of its duties, impose penalties for not performing them, and finally manage to take back both franchise and property, for the benefit of the public, but without compensation to the rightful owners. This proposition shocks our moral sense; but the possibility of such legislation and such results is involved in the present act, and depends upon the decision of this case.

C. B. LAWRENCE,
Of Counsel for Plaintiff in Error.

APPENDIX.

AN ACT *to regulate the carrying of freight and passengers on all railroads in this State.* March 6, 1871.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. It shall be lawful for any railroad company or corporation doing business in this State, from and after the date when this act shall take effect as hereinafter provided, to demand and receive from any person, corporation, company or association desiring the transportation of freight by any such railroad company or corporation over its line or lines of railroad, payment for such transportation at and after the rates following, viz.: Legal rates to be charged for the transportation of freight.

1st. On all kinds of grain, potatoes, flour, meal, beef, pork, and meats of all kinds, at the rate of six cents per ton per mile, for the first twenty miles or less that the same may be transported over such line or lines of railroad, and at the rate of five cents per ton per mile for any distance exceeding twenty and not more than fifty miles, and at the rate of four cents per ton per mile for any distance exceeding fifty and not more than one hundred miles, and at the rate of three and one-half cents per mile for any distance exceeding one hundred miles that the same may be transported; *provided*, that if the amount of freight desired to be transported at one time shall be less than one car load, such company or corporation may demand and receive an increased compensation therefor at the rate of twenty per cent. above the prices hereinbefore established.

2d. Upon sawed timber, lumber, laths, shingles, coal and salt, at and after the following rates, viz.: At the rate of ten dollars per car load for any distance not exceeding twenty miles, and in addition thereto the following rates, to wit: at the rate of eighteen cents per car load per mile for any distance beyond twenty miles and not exceeding fifty miles; and at the rate of thirteen cents per car load per mile for any distance beyond fifty miles and not exceeding one hundred miles; and at the rate of eleven cents per car load per mile for any distance beyond one hundred miles; *provided*, that if the amount of material herein mentioned, desired to be transported at any one time, is less than one car load, then such railroad company or corporation may demand and receive compensation, in addition to the price above specified, not exceeding twenty per cent. above the prices so specified. For the purposes of this section and the section preceding, a car load shall be taken to be twenty thousand pounds weight.

3d. Upon dry goods and other articles of merchandise usually carried by railroads at rates denominated first class, at rates twenty-five per cent. in advance of those specified in the first sub-division of this section.

4th. Upon sugar in barrels and other articles of merchandise usually carried by railroads at rates denominated fourth class, at the same rates specified in the first sub-division of this section.

5th. Upon wood, at the rate of nine dollars per car load for any distance not exceeding thirty-five miles, and at the rate of eighteen cents per car load per mile for any distance beyond thirty-five miles and not exceeding sixty miles, and at the rate of thirteen cents per car load per mile for any distance beyond sixty miles, provided a car load shall not be less than six cords.

Rate of passenger tariff.

SEC. 2. It shall be lawful for any railroad company or corporation in this State, from and after the date

when this act shall take effect as herein provided, to demand and receive payment for carrying passengers on any railroad in this State at and after the rate of five cents per mile for each person for the distance such person shall be actually transported by such railroad.

No charge for transferring freight; when to charge for storage.

SEC. 3. No railroad company or corporation shall charge any compensation for handling, transferring or storing any freights transported or to be transported over the line of its railroad, except that upon all freights stored for a longer period than two days after notice given to the consignee to remove the same, such company or corporation may demand and receive for storage exceeding that time such compensation as the same may reasonably be worth. But railroad companies and corporations that shall provide cars at convenient places for loading such freights, may require the consignors to load on the cars timber, lumber, lath, shingles and wood which shall be delivered for transportation.

To receive above mentioned freight when brought for transportation; no discrimination between individuals or corporation warehouses.

SEC. 4. It shall be the duty of all railroad companies and corporations in this State to receive all freights, of the kinds mentioned in this act, at any depot or station of such company or corporation, whenever brought to such depot for transportation, and to provide suitable places for the storage and reception of such freight at all of its depots and stations. And all railroad companies and corporations shall furnish equal facilities for transporting, and shall transport freights of every description in this State to and from warehouses or elevators other than those owned by any such company or corporation, at the same rates as from warehouses or elevators owned by such company or corporation, and shall make no discrimination in favor of nor against any warehouse or elevator.

Passenger fare to be paid in advance; freight on delivery.

SEC. 5. Payment for transportation of passengers may be demanded in advance, and payment for freight may be demanded at the place of delivery of such freight, after transportation and before delivery.

When freight passes over the line of one or more roads, how to proceed.

SEC. 6. That in all cases where freights are offered for transportation over any lines of railroads in this State, to be carried to and delivered at any point not on the line of said railroad, but upon the line of any other railroad with which there is a connection by railroad, the said railroad company or corporation where such freight shall be offered for transportation, shall receive and transport the same over its line of railroad to its point of junction with some other connecting line of railroad in the direction to which said freight is desired to be transported by the party offering the same; and any railroad company or corporation with whose line of railroad such junction is made, shall receive such freights and transport the same to the point of delivery, if on its line of railroad, or if not on its line of railroad, then to such point on its line of railroad as the owner or consignee of such freight may direct. And in all cases where freight shall be so offered for transportation, and, in order to reach the point to which the owner or consignee may direct the same to be transported for delivery, it shall be necessary to transport the same over two or more lines of railroad, the provisions of this act shall apply to each railroad or corporation over whose line of railroad such freight may be transported to its place of delivery, and shall be transported by each and all of such railroads at and after the rates hereinbefore specified: *provided*, that in ascertaining the amount of charges to be paid for such transportation, the distance such freight may have been transported over all such railroads shall be charged for only at the rates the same would have been charged for under the provisions of this act had the same been transported the whole of such distance over one only of such lines of railroad: *provided further*, that unless the railroad companies or corporations over whose lines of railroad any freight shall be so transported, shall agree upon some other manner of dividing the amount of

charges collected for such transportation, the same shall be divided between them in manner following: The whole amount of such charges shall be divided by the whole number of miles such freight shall have been transported by such companies or corporations, and each of such companies or corporations shall be entitled to its proportion of such charges according to the number of miles such freight shall have been transported over each of such lines of railroad.

To carry freight within a reasonable time.

SEC. 7. That all railroad companies or corporations doing business in this State, shall transport all freights ordered for transportation, within a reasonable time, and in the order of the reception of the same for carriage. And if any railroad company or corporation shall transport freights of any description for any person or persons, corporation, company or association, at rates less than are provided in this act, then such company or corporation shall thereafter transport freights of the same description over its line of railroad for all other persons at the same reduced rates during the time such discrimination is in force.

Declared public highways; penalty for non-compliance.

SEC. 8. That all lines of railroad in this State are hereby declared to be public highways, and all persons shall have and enjoy the right of passage over the same in the passenger cars running and to be run thereon, and the right to have freight of all kinds transported upon and over any and all of such railroads in the cars running and to be run thereon, at rates of charges not exceeding those specified in this act. And each and all railroad companies doing business in this State are hereby required to transport all passengers and freights in the manner and at rates not exceeding those specified in this act; and if any railroad company or corporation shall fail so to do, or shall violate any of the provisions of this act, such company or corporation shall pay to the party aggrieved by such failure the sum of one thousand dollars as settled and liquidated damages, to

be recovered by the party injured, in a civil action, and the costs and disbursements of such action.

Maximum rates; misuse of power; duty of Attorney General.

SEC. 9. The rates established by this act for the transportation of freight and passengers are hereby declared to be the maximum of reasonable rates. If any railroad company or corporation shall demand or receive higher rates for such transportation than are established by this act, it shall be deemed to have misused its powers and violated the terms on which its charter and franchises were granted; and it is hereby made the duty of the Attorney General of this State, upon receiving satisfactory evidence of such misuse, to cause proceedings to be instituted and prosecuted against such railroad company or corporation, in the proper court, for the forfeiture of the charter and franchises of such railroad company or corporation, or for the collection of a fine not exceeding one thousand dollars for each violation of the provisions of this act, at the discretion of the court before which the case shall be tried.

When act to take effect.

SEC. 10. This act shall take effect and be in force on and after the first day of May, A. D. one thousand eight hundred and seventy-one.

Approved March 6, 1871.

March 3, 1855.

A BILL *to incorporate the Transit Railroad Company.*

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Corporate name of company.

SECTION 1. That Charles W. Borup, Henry D. Huff, Orrin Smith, Abraham M. Fridley, Lorenzo D. Smith, A. J. Hilbert, Henry H. Sibley, Andrew G. Chatfield, Leonard B. Hodges, Henry McKenty, O. M. Lord, David Olmsted, Benjamin Thompson, W. A. Jones, Orlando Stevens, George H. Sanborn, Byron Kilborn, E. D. Clinton, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall

be, and are hereby made a body politic and corporate by the name and style of "The Transit Railroad Company," and by and under that name and style shall be capable of sueing and being sued, impleading and being impleaded, defending and being defended against, in law and in equity, in any and all courts and places whatsoever, as fully as natural persons; and the said corporation may make and use a common seal, and alter or renew the same at pleasure, and by their corporate name and style shall be capable of contracting and being contracted with, and of acquiring by purchase, gift, grant, devise, or otherwise, and of holding and conveying all such estate and property, real and personal, as may be necessary or convenient to carry into effect the objects and purposes of this act and of the said corporation.

Objects and purposes of company

SEC. 2. The said corporation is hereby authorized and empowered, and it is hereby declared that the objects and purposes thereof are to survey, locate, construct, complete, maintain, use and operate, and at their pleasure to alter the line thereof without changing the eastern terminus, a railroad with one or more tracks or lines of rails, from the village of Winona, in the county of Winona and Territory of Minnesota, westwardly by the most feasible and practicable route to St Paul, or some point on the Minnesota river, thence to intersect any railroad that may hereafter be constructed from Lake Superior or the Mississippi river to or towards the Territory of Washington, together with all necessary and proper stations, depots, turnouts, engines, cars, and other appurtenances and furniture of a railroad. And the said company is also authorized and empowered to extend in like manner such railroad, from its junction with the Minnesota river, to such point as they may deem proper on the line which may be adopted and established by the Minnesota Western Railroad Company as the line of their railroad, and also to such

point as they may deem proper on the line which may be adopted and established by the said "Lake Superior, Puget's Sound and Pacific Railroad Company," as the line of their railroad; *provided*, the point of intersection with the line of either of the said railroads shall not be east of the meridian of the mouth of the Blue Earth river.

Stock of company.

SEC. 3. The capital stock of the corporation hereby created, shall be five millions of dollars, and shall be divided into shares of one hundred dollars each, and shall be transferable in such manner as the corporation, by its regulations or by-laws, shall prescribe; but no share of said stock shall be transferred while there shall be any installments assessed thereon unpaid; and the directors of the said corporation may, with the consent of the holders of a majority of the stock thereof, increase the capital stock thereof to such sum as may be necessary or convenient to carry into effect all the rights and privileges hereby granted thereto, not exceeding twenty millions of dollars. The shares of any increase of stock shall be the same, and transferable in the same manner as the shares of the original stock.

Right of way.

SEC. 4. The said corporation shall have the right of way upon, and may appropriate to its own use and control, for the purposes of the said railroad and its appurtenances, land not exceeding two hundred feet in width throughout its entire length, and may, by its engineers, agents and contractors, enter upon, take possession of, and use all and singular any lands, streams, timber and materials of any and every kind, for the purpose of making the survey and location of said railroad, and of all stations, depots, turnouts, and other appurtenances thereto, and for the purposes of constructing the said railroad, and all bridges, depots, stations, turnouts, and other things necessary, proper or convenient for the same, and the full use and protection thereof, and of all its appendages and appurtenances; all such lands with-

in the limits of the line of the said railroad, and which may now belong to this Territory, or hereafter be acquired thereby, or by the State in which the said line may be, is hereby granted to the said corporation for such purposes, to be by them held and possessed so long as the same shall be used for such purposes, and no longer; *provided*, that in case any of the lands which have been reserved, or shall be hereafter reserved or granted for the use of schools, shall be included within the limits of the said line, the said corporation shall pay therefor such sum, not less than one dollar and twenty-five cents per acre, as the Legislature of the Territory or such other State shall fix, which sum shall be paid to the Governor thereof, and shall belong to the school fund of said Territory or State.

[SEC. 5 relates to the mode of acquiring additional lands, and being very lengthy, is omitted as having no bearing on this case.]

Corporators shall meet.

SEC. 6. The corporators named in the first section of this act, shall meet at Winona aforesaid on the first Wednesday of May next, to determine whether they will accept or reject this charter. If a majority thereof shall not then and there meet, he or they who may be present may adjourn the meeting to some future day, and to such place as he or they may deem proper, and notify the absentees of such adjournment; and the same proceedings may be had at any meeting until a majority shall be present. Whenever a majority of such persons shall have met, they shall by resolution determine to accept or reject this charter, and notify the Secretary of the Territory thereof. If they shall determine to accept this charter, they shall appoint three or more of their number, and such other person or persons as they may deem proper, as agents or commissioners to receive subscriptions to the stock of this corporation, and direct the times and place when and where the books for receiving such subscriptions will

be opened, and such books may be opened by different agents or commissioners at different places at the same time. Every person who shall subscribe for any stock of this corporation shall at the time of subscribing pay to the agent or commissioners two per cent. on the amount of stock so subscribed.

Election of directors.

SEC. 7. Whenever one hundred thousand dollars shall have been subscribed to the stock of this corporation, and two per cent. thereon paid as aforesaid, the stockholders shall meet in person or by proxy at such time and place as the holders of a majority of the stock shall prescribe, and proceed to elect twelve directors from among the stockholders, each share of stock being entitled to one vote by the holder thereof, which shall be cast in person or by proxy. The directors shall elect one of their number to be president of the board of directors, and he shall preside at all the meetings thereof at which he shall be present. The directors shall also elect one of their number a vice-president, who shall preside in the absence of the president. The directors shall also elect some suitable and competent person to be secretary. All covenants and conveyances of real estate made by the company shall be signed by the president or vice-president and attested by the secretary, and sealed with the seal of the company. They shall also elect a treasurer, who shall give such security for the safe keeping and payment of the moneys of the company as the directors shall require. At a meeting of the directors, seven shall form a quorum for the transaction of business; and all the affairs and business of the said company shall be conducted by or under the directions of the board of directors; and they are authorized, for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things necessary to be done, and not inconsistent with the Constitution and laws of the United States, or the laws of this Territory, or of this act. The directors

first elected shall by lot divide into three classes: the first class shall hold their offices for one year, and until their successors shall be elected and enter upon their duties; the second class shall hold their offices two years, until their successors shall be elected and enter upon their duties; and the third class shall hold their offices three years, and until their successors shall be elected and enter upon their duties; and there shall be annually elected, in the manner hereinbefore specified, four directors of the said corporation, who shall hold their offices three years, and until their successors shall be elected and enter upon their duties. Vacancies which may from any cause occur in said board of directors, may be filled by appointment by the majority of the directors in office, and such appointment shall continue until the next annual election of directors, when all vacancies shall be filled by election. The annual election shall be held at the office of the secretary of said company, and the secretary and two disinterested persons, to be appointed by the board of directors, shall be the inspectors of elections, and shall canvass the votes and make and sign a certificate of the result, and the secretary shall immediately notify the persons elected directors, of their election.

Assessment upon stock subscribed.

SEC. 8. The board of directors may, at such times as they may deem necessary or proper, assess upon the stock subscribed an installment of not less than five or more than twenty per cent., and require payment of such installment within a reasonable time, not less than thirty days from notice thereof, under the penalty of a forfeiture of the stock upon which the assessment was made.

Twenty-five miles of road to be commenced within five years.

SEC. 9. The said corporation shall locate at least twenty-five miles of the said railroad, and commence work thereon within five years from the time when this act shall take effect, and shall fully complete and equip at least one track from Winona to the Minnesota river,

with suitable and safe switches and turnouts, within ten years of the same time.

Construction of bridges.

SEC. 10. For the purpose of constructing and using said railroad, the said corporation is authorized to construct the said railroad and the necessary bridges across and over public highways and navigable streams; *provided*, that it be so done as not to obstruct the highways, or to obstruct or impede the navigation of any navigable stream. And the said corporation is hereby authorized to contract with any other railroad company or corporation, with whose road their railroad may come in contact, for the crossing or connection of such roads, and for the joint use thereof.

Tracks to be laid with H or T rail.

SEC. 11. Every track of said railroad shall be laid with the H or T rail, of not less than sixty pounds per yard lineal, and all the engines, cars and other furniture shall be well made, of good material and of approved form and kind, equal in quality to those of the best equipped and furnished railroads in the United States.

Penalty for injuring road.

SEC. 12. If any person shall willfully obstruct or in any way injure, spoil or destroy the railroad, or any part of the railroad, or any thing affixed or appurtenant thereto, and necessary or convenient for its free and safe use, or any of the materials for the construction thereof, or any building, fixture, or other structure, or carriage, engine or car erected or kept for the use thereof, such person shall be deemed guilty of a misdemeanor, and liable to be indicted and punished therefor; and he shall also be liable to pay to the company twice the amount of the damages occasioned thereby. And in case the death of any person shall be produced by or in consequence of any willful or malicious obstruction or injury to the said railroad, or to any engine or car theron, the person who shall so obstruct or injure the said railroad, or car or engine thereon, shall be deemed guilty of murder in the first degree.

Badge to be worn by the employees.

SEC. 13. Every conductor, baggage-master, or agent or servant of the said company, and who shall be engaged in the ticket office or on the cars on said railroad, shall wear upon his hat or cap a plain badge, which shall indicate his office or station, and no conductor or collector shall demand or be entitled to receive any fare or toll from any freighter or passenger, or exercise any control or direction in his station, or be authorized or allowed to interfere with any passenger, baggage or freight, without wearing such badge.

Locomotives to be furnished with alarm bells.

SEC. 14. Every locomotive engine on said railroad shall be furnished with a good and sufficient alarm bell or whistle, which shall be fully sounded at least 80 rods distant from every highway crossing, while the engine, either with or without a train of cars, shall be passing over said road, and for every violation of this section the said company shall forfeit and pay to whomsoever shall prosecute for the same the sum of ten dollars.

Act declared a public act.

SEC. 15. This act is hereby declared to be a public act, and may be amended by any subsequent Legislative Assembly, in any manner, not destroying or impairing the vested rights of said corporation.

When act to take effect.

SEC. 16. This act shall be in force from and after its passage.

Approved March 3, 1855.

March 3, 1857.

AN ACT *making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

Grant of lands to Minnesota for railroads, &c.

That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construc-

tion of railroads, from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone lake and the mouth of Sioux Wood river, with a branch, *via* Saint Cloud and Crow Wing, to the navigable waters of the Red river of the North, at such point as the Legislature of said Territory may determine; from Saint Paul and from Saint Anthony, *via* Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux river, with a branch *via* Faribault, to the north line of the State of Iowa, west of range sixteen; from Winona, *via* St. Peter, to a point on the Big Sioux river, south of the forty-fifth parallel of north latitude; also from La Crescent, *via* Target lake, up the valley of Root river, to a point of junction with the last mentioned road, east of range seventeen, every alternate section of land designated by odd nnmbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands, (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by the Territory

Grant in lieu of lands pre-empted or sold.

or future State of Minnesota, for the use and purpose aforesaid; *provided*, that the land to be so located shall, in no case, be further than fifteen miles from the lines of said railroads or branches, and selected for and on account of each of said roads or branches; *provided further*, that the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; *and provided further*, that any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Lands, how applied.

Act not to apply to reservations, except as to right of way.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by such grant shall remain to the United States, within six miles on each side of said roads and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry, until the same shall have been first offered at public sale at the increased price.

Price of alternate sections doubled.

SEC. 3. *And be it further enacted*, That the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the Legislature thereof for the purposes herein expressed, and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free from toll or other

Object of grant.

Railroads to be a highway for Government.

charge upon the transportation of any property or troops of the United States.

Lands, how disposed of.

SEC. 4. *And be it further enacted*, That the land hereby granted to said Teritory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the Governor of said Teritory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed, as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches, may be sold; and so from time to time, until said roads and branches are completed; and if any of said roads or branches is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

Transportation of mails.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported over said roads and branches, under the direction of the post office department, at such price as Congress may by law direct; *provided*, that until such price is fixed by law, the Postmaster General shall have the power to determine the same.

This act not to apply to lands in Indian Territory till their title is extinguished.

SEC. 6. *And be it further enacted*, That in case any lands on the line of said roads or branches are within any Indian Territory, no title to the same shall accrue, nor shall the same be entered upon by the authority of said Territory or State, until the Indian title to the same shall have been extinguished.

SEC. 7. *And be it further enacted*, That there be and is hereby granted to the State of Alabama, for the purpose of aiding in the construction of a railroad "from the line of Georgia, on the Chattahoochee river, to the city of Mobile, Alabama," through the counties of Henry, Dale, Coffee, Covington, Conecuh, Baldwin and Mobile, and a branch railroad "from Eufaula to Montgomery, through the counties of Barbour, Pike, Macon and Montgomery," chartered by the State of Alabama by an act entitled "An act to authorize the Savannah and Albany Railroad Company to extend their railroad from the line of Georgia, on the Chattahoochee river, to the city of Mobile, Alabama, and to extend a branch road from Eufaula to Montgomery," approved December twentieth, eighteen hundred and fifty-three, alternate sections of the public lands to the same extent, and in the same manner, and upon the same limitations and restrictions in every respect as was granted to aid in the construction of other railroads, under an act of Congress, entitled "An act granting public lands in alternate sections to the State of Alabama, to aid in the construction of certain railroads in said State," approved June three, eighteen hundred and fifty-six. Similar grant to Alabama.

Approved March 3, 1857.

AN ACT *by the Minnesota Legislature, "to execute the trust created by act of Congress," and granting lands to Transit Railroad Company.*

SECTION 1. The Transit Railroad Company is hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain and operate the Transit railroad, with one or more tracks or lines, from the city of Winona, on the most direct and feasible route by way of St. Peter to the Big Sioux river, south of forty-fifth parallel of north latitude; and

shall have, possess, exercise and enjoy by the same rights, privileges, functions, franchises, authority and immunities, (with reference to the said route, or any railroad to be built thereon,) and there is hereby conferred upon the Transit Railroad Company all the power and authority contained in the charter of said company, passed by the Legislative Assembly of the Territory of Minnesota, entitled "An act to incorporate the Transit Railroad Company," approved March 3, 1855, for the purpose of carrying out the objects of this act, and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built—and the whole of the railroad or said road hereby authorized to be constructed, shall be constructed by said Transit Railroad Company within ten years from the third day of March, A. D. 1857. The Transit Railroad Company shall never set up the defense of usury to any contract in any court whatsoever.

SEC. 2. For the purpose of aiding in the construction of the railroad, which by this act the Transit Railroad Company is authorized to construct, all the interest and estate, present and prospective, of this Territory, and future State, in or to any and all the lands granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Winona, *via* St. Peter, to the Big Sioux river, south of forty-fifth parallel of north latitude, by virtue of an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections in the State of Alabama, to aid in the construction of a certain railroad in said State," approved March 3, 1857, together with all and singular the rights, privileges and immunities conferred or intended to be conferred upon

said road by the said act of Congress, are hereby granted to and vested in the said Transit Railroad Company; *provided*, that the said lands shall be exclusively applied to and used by said Transit Railroad Company in the construction of a railroad from Winona, *via* St. Peter, to a point on the Big Sioux river south of the forty-fifth parallel of north latitude, and shall be disposed of only in the manner prescribed in said act of Congress, approved March 3, 1857, and shall be applied to no other purpose whatsoever.

SEC. 3. The location and designation, and any change or alteration of the route and line of said railroad, shall be made by the Transit Railroad Company, and the same shall from time to time, and as fast as practicable, be reported to the Governor of the Territory or future State of Minnesota. The selecting of lands provided for in the act of Congress hereinbefore mentioned, and herein vested in said Transit Railroad Company, shall be made by such agent or agents as shall be appointed by the Governor of this Territory or future State of Minnesota, who is hereby required to appoint the same upon the request of said company; compensation of such agents shall be at the cost and charge of said company, without charge of any kind upon the Treasury of this Territory or future State of Minnesota; said railroad, which shall be constructed by the application of funds derived from the lands herein granted, shall be and remain a public highway for the use of the Government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States; and the United States mail shall be transported over said railroad under the direction of the post office department, as provided in said act of Congress.

SEC. 4. The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consid-

eration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the Treasury of the Territory or State of Minnesota three per cent. upon all the gross earnings of said road, the amount of the gross earnings to be ascertained by the verified statement of the president and treasurer of said company as hereinbefore provided for; and the said three per cent. shall be so paid into the Treasury of the Territory or future State of Minnesota within sixty days after any portion of the said road shall be operated, and annually thereafter; and the same, when paid, shall be in lieu of all taxes whatever.

SEC. 5. The said Transit Railroad Company shall have full power and authority to transport persons and property in boats, vessels and barges, or other water craft, on any navigable stream or water, which their said road may run to or connect with, and to collect and receive reasonable compensation for the same; and for that purpose may purchase or hold and own such vessels, boats, or other craft, as may be required for the purpose aforesaid.

SEC. 6. The said Transit Railroad Company shall be capable, in law, of taking and holding any lands granted by the Government of the United States, or of this Territory or future State of Minnesota, to aid in the construction of railroads, which shall be conveyed to said company by this act, or by deed, in fee simple, or any lesser estate, or by operation of law. And they may also borrow money, issue bonds or other evidences of debt, to secure the same, and may also mortgage, or pledge, or otherwise dispose of all the right, title, claim or demand, of, in, or to, any lands, or interest in lands, granted to said company by this act, and in any other estate, real, personal, or mixed, of which they may be seized at the time of execution of such mortgage, or which they may acquire subsequent thereto, in such

manner and on such terms as the directors may think proper.

SEC. 7. Whenever any twenty continuous miles of said railroad shall be completed, it shall be the duty of the Governor of this Territory, or future State, to certify that fact to the Secretary of the Interior, and so from time to time, as often as twenty more continuous miles of said road shall be completed.

SEC. 8. The Root River Valley and Southern Minnesota Railroad Company shall have at all times the right to send passengers and freight over the Transit railroad, at as low rates and charges per mile as the said Transit Railroad Company may charge over any portion of their said road.

SEC. 9. Said Transit Railroad Company shall have full power and authority to extend its line of railroad from its terminus on the Big Sioux river to any point on the Missouri river south of the forty-fifth parallel of north latitude.

SEC. 10. This chapter two of this act shall take effect and be in force from and after the passage of this act.

Approved March 22, 1857.

AN ACT *to facilitate the construction of a railroad from Winona westerly, by the way of St. Peter.* March 10, 1862.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That all the rights, benefits, privileges, property, franchises and interest of the Transit Railroad Company, acquired by the State of Minnesota, by virtue of any acts, deeds, agreement or things, by the said State or company, heretofore done or suffered, or by virtue of any laws of the State or former Territory of Minnesota, or by reason of the sale of said road, or any part thereof, by the Governor of said State, or

Board of incorporators; corporate rights granted.

by reason of any provision of the Constitution of said State, be and the same are hereby granted, transferred and continued to William Lamb, S. S. L'Homedieu, John W. Kirk, Herman Gebhart and H. C. Stimson, for the purpose and on the terms and conditions hereafter in this act provided, free and clear of all claims or liens thereon, and free and discharged from all claims of the State of Minnesota against the same, except as hereinafter provided. And the said persons, by the name and style of the Winona and Saint Peter Railroad Company, are hereby invested with the right to enter upon, use and enjoy all and singular the road, properties, franchises and immunities heretofore possessed by or granted to the Transit Railroad Company, by an act approved March 3d, 1855, and by an act approved May 22d, 1857, and all other acts granting privileges to said company, and all the corporate rights and franchises of said Transit Railroad Company are hereby vested in and continued to the said William Lamb, S. S. L'Homedieu, John W. Kirk, Herman Gebhart and H. C. Stimson, their associates, successors and assigns, by the name and style of the Winona and St. Peter Railroad Company.

Board of directors; vacancies; how filled.

SEC. 2. The persons named in the first section of this act shall constitute a board of directors, a majority of whom shall be a quorum, who shall serve for one year, and until their successors are chosen and qualified. The board of directors of said company shall thereafter consist of five persons, to be elected by the stockholders; but the number may be increased to nine members by a vote of said company. Elections for directors shall be held annually, at such time and place as may be fixed by the by-laws of said company. All vacancies may be filled by the remaining members of the board.

Amendment to former act.

SEC. 3. That section eleven of the act incorporating the Transit Railroad Company, approved March 3, 1855, be amended by substituting therefor, as follows:

The track of said road shall be laid with T rail, and the engines and cars shall be of approved quality, suited to the business of said road.

Constructing of fences, how governed.

SEC. 4. That whenever the owner or occupant of any land through which said road shall pass, or adjoining the line of said road, shall inclose with a fence his or her lands, bounded in part by said road, said company shall construct and maintain its portion of the same, in the same manner that individuals are or may be required by law to erect and maintain partition fences, and all fences erected on the line of said road by said company, or by the owners or occupants of lands along the line thereof, shall be considered partition fences, and be in all respects governed by the laws in force regulating the same. Said company shall construct such necessary farm crossings over the line of their said road as may be required by the owners of the land divided by said road. At any time after the expiration of ten years from and after the passage of this act, the Legislature shall have full power to alter the provisions of this section, and to make such further and other rules and regulations respecting the construction and maintenance of farm and cattle guards by said company as they may deem best.

Duty of Governor upon completion of ten continuous miles of said railroad.

SEC. 5. Whenever any continuous ten miles of said road shall be completed, with the running of regular trains of cars on the same, it shall be the duty of the Governor to certify the same to the Secretary of the Interior, and thereupon, and not before, said company may demand and shall be entitled to receive from the Governor, acting in the name and for the State, a deed in fee simple for one hundred and twenty sections of land, which by the act of Congress is authorized to be sold after the location and before the completion of twenty miles of road; and whenever twenty continuous miles of said road shall be completed, with regular trains of cars running, the Governor shall certify the

same to the Secretary of the Interior, and thereupon it shall be the duty of the Governor to execute to said company a deed in fee simple for a further quantity of one hundred and twenty sections of lands, and in like manner, and whenever, as often as a further distance of twenty miles shall be so completed, the Governor shall certify the same to the Secretary of the Interior, and in like manner convey to the said company another quantity of one hundred and twenty sections of land.

Property may be mortgaged.

SEC. 6. Said company shall not, until after said road is completed from Winona to St. Peter, make any mortgage upon said road or franchises, or any of said lands, for any purpose other than constructing, equipping and completing said road.

May construct telegraph lines.

SEC. 7. Said company may construct a telegraphic line upon its road, connect with other telegraphic lines, and charge fees for transmitting messages thereon.

Forfeiture of road, property, etc., when.

SEC. 8. It is hereby stipulated, as a further condition on which the grant of privileges to said company is made, that said company shall complete the construction and equipment of ten miles of said road, commencing at Winona, so that the same shall be ready for business by the first day of January, 1863; and as a further condition of the grants herein contained, said company shall within two years from the last named date complete and equip said road ready for business from Winona to Rochester, and within each succeeding year, after the last named date, complete not less than thirty miles of said road, until the whole is completed; *provided*, that when said road shall be completed to a point twenty (20) miles distant from the Minnesota river, the said company shall commence the grading of the road at St. Peter, in Nicollet county, and continue working towards said point of completion until the road is finished. And if said company shall fail to complete ten miles, and to complete said road to Rochester, within the time herein specified, and to complete each year there-

after thirty miles of said road as hereinbefore provided, upon such respective default, then all the rights, privileges and franchises hereby granted, pertaining to such portion of said road as shall not then be completed, shall revert to and vest in the State, without merger or extinguishment, but the rights, privileges, franchises and lands pertaining to such portion of said road as shall be completed as herein provided, shall continue in and remain with said company, unaffected by any forfeiture provided by this section of this act.

Rights of pre-emptors.

SEC. 9. That any person or persons, or his, her or their heirs or representatives, who was or were entitled to the right of pre-emption under the laws of Congress, to any of the lands granted by the act of Congress approved March 2d, 1857, and by this act granted to the Winona and St. Peter Railroad Company, and who have not purchased the same from the United States, and were entitled to do so when the line of route of said road was definitely fixed, and shall have continued in the actual occupancy thereof to the time the Winona and St. Peter Railroad Company shall become entitled to the same, under the provisions of this act, *and of the said act of Congress*, shall be entitled to purchase the same of said company at and for a price or sum not exceeding two dollars and fifty cents per acre if within the six mile limit, and not exceeding one dollar and twenty-five cents per acre if outside of the six mile limit; *provided*, that application for the same, and a tender of the sum required, shall be made to said company within six months from the time said company is entitled to the said lands.

Regulations for transportation of passengers and freight.

SEC. 10. The Winona and St. Peter railroad shall transport by all regular trains, all passengers and freight delivered to the same by any connecting line of railroad, now or hereafter to be constructed, on the same terms and at no greater rates than for the time being shall be charged by said Winona and St. Peter

railroad for the same service to persons living on the line of said road; *provided*, that any such connecting line shall be governed by the same rules in transporting passengers and freight on their several lines, delivered by said Winona and St. Peter Railroad Company.

When act to take effect.

SEC. 11. All acts repugnant to or inconsistent with this act are repealed. This act shall be in force from and after its passage.

Approved March 10th, 1862.

Feb. 28, 1866.

AN ACT *to amend an act entitled "An act to facilitate the construction of a railroad from Winona westerly by way of St. Peter."*

Be it enacted by the Legislature of the State of Minnesota:

Amends act of March 10, 1862.

SECTION 1. That line six of section eight of an act entitled "An act to facilitate the construction of a railroad from Winona westerly by the way of Saint Peter," approved March 10, 1862, be and is hereby amended so as to read, "the first day of January, 1864;" *provided*, that said company shall be bound to carry freight and passengers upon reasonble terms; *provided further*, that the extension of time for the construction of said railroad, and all rights herein granted said company, are upon the express condition that said railroad company shall build the said thirty miles per year, as provided for in said act, until said railroad shall be built and constructed westerly to the Minnesota river.

When act to take effect.

This act shall take effect and be in force from and after its passage.

Approved February 28, 1866.

Supreme Court of the United States.

OCTOBER TERM, 1875.

WINONA & ST. PETER R. R. CO.,
Plaintiff in Error,

vs.

JOHN D. BLAKE ET AL.,
Defendants in Error.

Reply to Argument of Defendants in Error.

C. B. LAWRENCE,
Of Counsel for Plaintiff in Error.

CHICAGO, ILL.:
CHARLES E. SOUTHARD, PRINTER, 175 MONROE STREET.
1875.

Supreme Court of the United States.

OCTOBER TERM, 1875.

WINONA & ST. PETER R. R. CO., *Plaintiff in Error,*
vs.
JOHN D. BLAKE, *et al.*, *Defendants in Error.*
} *Error to the Supreme Court of Minnesota.*

REPLY TO ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

I.

It is claimed by counsel for the defendant in error that the franchise which is conferred upon railway companies is a "prerogative franchise," and therefore converts the companies into mere instrumentalities of Government, and brings them and their property under its absolute control.

By prerogative franchise is meant the transfer of a right or privilege belonging peculiarly to the Government. The construction of public highways is claimed to be such a right. But it is difficult to see how the property rights of the grantee of a franchise are affected by the greater or less degree of

dignity in the franchise conferred. The providing of public highways may be a governmental duty, and therefore a good reason for conferring the right of eminent domain upon the persons to whom is granted the power of providing them; but the character of the franchise granted can not affect the contract into which the Government enters on making the grant, or impair the rights of the grantee in the property invested on its faith. If the State contracts with an individual to perform some duty of its own, there is only the greater obligation upon the State to faithfully observe its part of the contract.

A similar argument was urged in the Dartmouth College case. To provide for public education is one of the highest of governmental duties—a duty of as high a character as providing means of communication between different localities. It was therefore insisted in that case, that institutions for public education were under Government control, but the Court, while admitting the governmental duty, in regard to public education, denied the right of impairing a contract under which that duty was performed by others.

But railway companies not only construct roads—they operate them, and it is to their business as common carriers that the questions in this case relate. In the transaction of this business, these companies are certainly not exercising a governmental prerogative or franchise. It may be the duty of the State to construct highways, but clearly it is not its duty to transport passengers and freight upon them, or to perform any of the functions of a common carrier. The argument, therefore, based on the doctrine of prerogative franchise, falls to the ground.

II.

It is also claimed that railway corporations are regarded in England as public corporations, and a passage from Grant on Corporations is cited in support of the assertion.

The explanation is obvious. In England, the distinction between public and private corporations is taken in reference to the power of visitation, as is evident from the language of Lord Holt, in the case of Phillips vs. Bury, 1 Lord Raymond, 5, cited on pages 75–6, of the brief for defendant in error. He says, private corporations are those constituted for private charities, and only subject to such rules and statutes as the founder ordains, and the founder and his heirs are visitors unless he appoints others. All other corporations Lord Holt denominates public, because they are established by the Government with a view to the public good, and subject to Government visitation or control.

But in this country the line between public and private corporations is differently drawn, for reasons perfectly obvious. Public corporations with us comprise only municipal corporations, and those in which the entire interest belongs to the Government. All other corporations, that is, all corporations in which the stock is owned either in whole or in part, by individuals, are private. The former are under the control, in all respects, of the Government that creates them. The latter are not under such control in any degree that would impair the rights of the stockholders under their charter. The principle of the distinction in both countries is the same, but its practical application is very different. Every corporation

created by Parliament is in theory under its control, whatever may be the provisions of the charter, though such control is never in fact exercised for the deprivation of property rights. In this country the State can not recall or violate the charter it grants, unless it reserves such power.

For these reasons the distinction between public and private corporations, as defined by all courts and law writers in this country that have touched upon the subject, is a logical distinction, and one not inconsistent with the English view.

It is said by counsel for defendent in error, that no English court or law writer recognizes one class of corporations as less subject to interference on the part of the State than another. This may be true, because under the English Government the distinction does not exist which here arises from our fundamental law. The provision in the Federal Constitution, forbidding State legislation impairing the obligation of contracts, has produced a class of cases here which could not arise in England, and which establish corporate rights upon a basis peculiarly our own. It is immaterial what is meant by public and private corporations in England, or what may be the rights of either as against the Government. In this country these rights spring from our written constitutions, and under these constitutions it was impossible for our courts to draw the line of distinction between puplic corporations, which are subject to legislative control, and private corporations, which are not so subject, except precisely where they did. The distinction is clear and logical.

It is claimed by counsel on the other side, that Chief Justice

Marshall, in his opinion in Ogden vs. Bank of United States, 9 Wheat., 738, spoke of the Bank as a public rather than a private corporation. For the purposes of that case the bank was undoubtedly to be so regarded. The question was, whether a State could tax the *operations* of the bank. The Court said it could not, because the bank was created as the fiscal agent of the government and the States could no more tax its operations, than they could tax the operations of an officer of the Government appointed to perform the same duties which were imposed by the charter upon the bank. The property of the bank, it was conceded, might be taxed.

But is a railway company, engaged in carrying passengers and freight, to be considered as an agent of the Government, or performing a governmental duty? Undoubtedly, a State can build and operate a railroad, unless forbidden by its Constitution. But this is certainly not a government function or duty, and no State in this Union, so far as I am aware, has ever undertaken its performance. If the railway companies are State agencies or instrumentalities, engaged in performing a function of the Government, then the immense amount of taxes levied upon their *operations*, by the Federal Government, during and since the war, has been unconstitutionally levied, and must be restored.

In the case of the Union Pacific R. R. Company vs. Pinesston, 18 Wall., this Court, in the opinion by Mr. Justice Strong, spoke of the company as "a *private* corporation, though existing for the performance of public duties." This expression is the more significant because, by the charter of

that company, it is expressly made, in many respects, an agent or instrumentality of the Federal Government.

III.

It is denied, on the other side, that a railway company can have an implied power to charge compensation for transporting passengers and freight. The following extraordinary propositions are laid down in the brief of defendant in error, page 44:

"1. The grant of the franchise to erect and maintain a pub-"lic establishment of any description—whether it be a public "wharf, a public market, or a work in the nature of a public "highway—does not carry with it power to demand fees from "the public on account of its enjoyment of the facilities afforded "by such establishment.

"2. When the establishment authorized to be erected and "maintained is in the nature of a public highway, power to de-"mand compensation for passage over it must not only be "granted in express terms; *but the rates of such compensation* "*must also be specified in the grant,* or the concession in that "particular will be void, and no power to levy tolls will be "created."

The first case cited in support of these positions is Heddy vs. Whitehouse, Croke Eliz., 558.

The King had granted to the city of Northampton the right to hold an annual fair or market, with all the franchises pertaining to a fair of that kind. The question was, whether this grant gave a right to levy tolls upon persons availing themselves of the fair. The Court held it did not, and Popham, C.J., gives the reason of the decision in words which are not

quoted in defendant's brief. The Chief-Justice said: "Toll is "not a thing of necessity, nor incident to a fair, for there are "many places where no toll is paid. *If toll has been used "to be paid, no doubt but that by grant of a fair it had "well passed without the words, 'cum pertinentiis.'*"

The italics are mine, and the sentence italicised overthrows the entire position of counsel for defendant in error.

The next case cited is Lightfoot vs. Lennett, Croke James, 421.

In that case, the right to maintain two public bridges had been granted, with power to take such tolls for the passage of beasts as should be customary, *there and elsewhere* within the kingdom. The Court decided, very briefly, two points, and they were all it did decide. The first was, that a patent for such tolls as are taken "there and elsewhere," was void for uncertainty, and the second, that the defendant's plea was bad, because it averred the tolls taken at other places, but not those taken there.

Another case cited is the corporation of Stamford vs. Pawlett, 1 Crompton & Jervis, 57. In that case, which was warmly contested, all the previous decisions upon this subject are reviewed, and the Court closes its opinion with the following paragraph, which is very noteworthy:

We especially call the attention of the Court to that portion of the paragraph relating to the liability of the public to extortion if the grantee of a franchise is permitted to establish what may seem to him a reasonable toll.

"Upon this review of the authorities, we are of opinion, "that the corporation is entitled to retain their verdict. We "think that where a grant of tolls is found in a charter, the "word ought to have some meaning, and the charter some "operation, and that it can receive operation only by being "construed to mean a reasonable toll.

"We think that no one case has ever been determined against "this construction. We are convinced that the terms used in "the present grant are nearly the same as are used in a great "majority of those charters which have received the fiats of "the Attorney Generals for the time being, and passed the "Great Seal; that tolls have in numerous instances been received "under them; and, that if we were to decide against this charter "upon the principles contended for, we should shake the "security of a vast mass of property which has been enjoyed "undisturbed for an age, perhaps for ages. We also think "the observation that, to permit a grantee to take whatever may "appear to him to be a reasonable toll, is to make a grantee, a "judge for himself, and to expose the subject to extortion, has "received a satisfactory answer. The grantee demands it at his "peril, and at the hazard of a private as well as a public "prosecution: of the private at the suit of the party injured; "of a public at the suit of the Attorney General, in the name "of his Majesty.

"The inconvenience of raising such questions cannot be "avoided by specifying the sum. The King cannot grant an "unreasonable toll; and it is competent to every subject of "the realm, from whom the toll is demanded, to question its

"being reasonable, even when the exact sum is specified in "the charter.

"This question may always be brought under discussion in "whatever terms the grant may be expressed.

"For these reasons we think that the verdict must stand."

It is true, as a general rule of construction, that in public grants nothing is to be presumed against the public by implication, but it is also true that the intent of the Legislature, when it is unmistakable, is to be carried into effect, and therefore whatever is indispensable as a means of effectuating the grant will pass.

In the Binghampton Bridge case, 3 Wall., 57, this Court stated the principle of construction as follows:

"A great deal of the argument at the bar was devoted to "the consideration of the proper rule of construction to be "adopted in the interpretation of legislative contracts. In this "there is no difficulty. All contracts are to be construed to "accomplish the intention of the parties; and in determining "their different provisions, a liberal and fair construction will "be given to the words, either singly, or in connection with the "subject matter.

* * * * * * * *

"The principle is this; that all rights which are asserted "against the State must be clearly defined, and not raised by "inference or presumption; and if the charter is silent about "a power, it does not exist.

"If, on a fair reading of the instrument, reasonable doubts "arise as to the proper interpretation to be given to it, those "doubts are to be solved in favor of the State; and where it is "susceptible of two meanings, the one restricting and the other "extending the powers of the corporation, that construction is "to be adopted which works the least harm to the State.

"But if there is no ambignity in the charter, and the powers "conferred are plainly marked and their limits can be readily "ascertained, then it is the duty of the court to sustain and "uphold it, and to carry out the true meaning and intention "of the parties to it.

"Any other rule of construction would defeat all legislative "grants, and overthrow all other contracts."

The learned counsel for defendant in error, on page 34 of his brief, uses the following language, speaking in reference to railway companies:

"If they attempt to discontinue either the maintenance or "the operation of the road, *mandamus* at the suit of the Gov- "ernment lies to enforce the performance of their duty in the "premises."

And on page 61, the following:

"The conclusion is unavoidable, by any process of reason- "ing, that the right to levy taxes upon the public in the form "of tolls, is not one of those powers which the plaintiff in error "has acquired by its charter, and, therefore, not one which it "could, prior to the passage of the act in question, lawfully "exercise."

The harmonious consistency of these two paragraphs is quite remarkable. Railway companies may be compelled by *mandamus* to operate their roads, and if they do not obey the writ, their officers are liable to fine and imprisonment; and yet if there is not a grant in *express terms* to demand compensation for the services they render, they can demand none, and must operate the road at their own expense. The first of the above propositions by the defendant is true, but I am surprised that the second can be seriously urged.

In conclusion, upon this point, I wish to call the attention of the Court to section 4 of article 10 of the Constitution of Minnesota.

That section, after authorizing lands to be taken for public use, proceeds as follows:

"But all corporations being common carriers, enjoying "the right of way in pursuance of the provisions of this sec- "tion, shall be bound to carry the mineral, agricultural and "other productions or manufactures, on equal and reasonable "terms."

Here, then, is a distinct constitutional recognition of the right of any corporation, that is a common carrier, to demand reasonable terms of compensation.

IV.

The learned counsel for the defendant in error, after showing great ingenuity in seeking plausible reasons upon which the legislation in question can be sustained, finally arrives,

under the fifth head of his brief, at the true basis upon which all such laws must rest. His first sentence, under this head of his argument, is as follows, (page 64):

"It must be considered an indisputable proposition, that, in "all governments, a power somewhere resides, having absolute "supremacy over men and things within its territorial jurisdic- "tion."

After following the line of argument suggested by this startling proposition, he arrives, on pages 68–9 at the following conclusions:

"A State Legislature has jurisdiction to prohibit the use of "property for particular purposes, and even to prohibit its use "for any but certain specified purposes It may go further, and "make it unlawful to hold and own particular kinds of property "at all. It may even absolutely forbid the sale of property. In "short, it may pass any law regulating the tenure and enjoy- "ment of private property, which leaves title and possession "undisturbed, with liberty to use the property for *some* purpose "beneficial to the owner. It matters not that the necessary "effect of such law may be to practically annihilate the ex- "changeable value of the property; for that is something not "protected against the law-making power, under any system of "jurisprudence, or fundamental law, that has ever been "devised.

"The great body of the jurisprudence of any country has to "rest upon such an unlimited power."

While these propositions are altogether astonishing as propositions of constitutional law, there is a bold honesty in placing this Minnesota statute upon this basis that is quite admirable. If I could suppose the learned counsel to be really serious in these positions, I would suggest to him the

reading of the opinion of this Court in the recent case of Loan Association vs. Topeka, 20 Wallace, 656. But he can not be serious. These propositions must have been announced, not as the personal convictions of the learned counsel, but as positions necessary to be professionally stated and defended as the ultimate and only basis of this legislation. In this, the learned counsel is correct. If the foregoing propositions stated by him are true; if the government of the State of Minnesota is a government of perfectly absolute and unlimited powers; if all the property within its borders is indeed held at the arbitrary discretion of its Legislature, then the act in question can be sustained. But the propositions are not true. They are monstrous errors. The Legislature of Minnesota has not "absolute supremacy over men and things within its "territorial jurisdiction," as asserted by its learned counsel; and the legislative act which rests upon that assumption must fall.

V.

I desire to cite one more authority in addition to those contained in my original brief, to the effect that what is a reasonable compensation is a purely judicial question.

At the August Term, 1874, of the Supreme Court of Wisconsin, the Attorney General of that State applied for injunctions to restrain the C. & N. W. R. R. Co., and the Milwaukee & St. Paul R. R. Co. from operating their trains except in compliance with an act of the Legislature of Wisconsin, similar to that now under consideration. In Wisconsin, the Constitution reserves to the Legislature the power to alter or repeal charters, and under that clause the Court held the

act of the Legislature valid. On the first argument, however, and when the principal opinion of the Court was given, it was supposed that one of the charters held by the Milwaukee & St. Paul Company had been granted by the Territorial Legislature, and accepted by the company, before the State Constitution was adopted. Acting under that belief, the Court, while allowing the injunction as to all the other charters, did not allow it as to that. The Court recognized and obeyed the authority of the Dartmouth College case, though with a protestation on the part of the Chief Justice who wrote the opinion. The spirit of the opinion is antagonistic to railway companies, and the learned and able Chief Justice Ryan presents the claim of the State to control their tariffs in the strongest possible form; but nevertheless he admits that such claim can rest only on the reserved power. I will file a pamphlet copy of the opinion. On pages 40 and 41, the Chief Justice uses the following language:

"This charter, being accepted—as we are bound here to "assume—before the adoption of the State Constitution, is not "affected by the reserved power in that instrument. And it "is undoubtedly a contract within the rule in the Dartmouth "College case, which the State Legislature cannot impair.

* * * * * * * *

"We are of opinion that the franchise is not one vesting in "the corporation an absolute right of exacting whatever tolls "it might see fit.

"The courts have authority to limit the right to reasonable

"tolls: to tolls reasonable, not in the arbitrary judgment of the "corporation, but in fact. That is, indeed, as against a great "railroad company, not a very effective remedy.

"But the law gives the remedy to all aggrieved by the "exaction of unreasonable tolls. The question here, however, "is not what the courts can do to control the exercise, but "what the Legislature can do by statute to limit the right of "a franchise so broad that it seems to invite extortion. We "have already sustained the power of the Legislature to limit "rates of toll of railroads subject to legislative control. But "that power rests on the authority of the Legislature, not on "the reasonable rate of tolls fixed. And the restraint of a "franchise to take reasonable tolls, to tolls reasonable in fact, "*is a judicial, not a legislative function.*

* * * * * * * *

"But the right of the corporation here to take tolls at dis-"cretion, being thus fixed by express franchise in their "charter, there seems to us to be no room for doubt that, "viewing the charter as a contract, the franchise is a positive "grant to take tolls in the manner and to the extent prescribed "by it, subject to such judicial construction and control as it "may bear: and is a vital part of the contract of the charter "within the authorities."

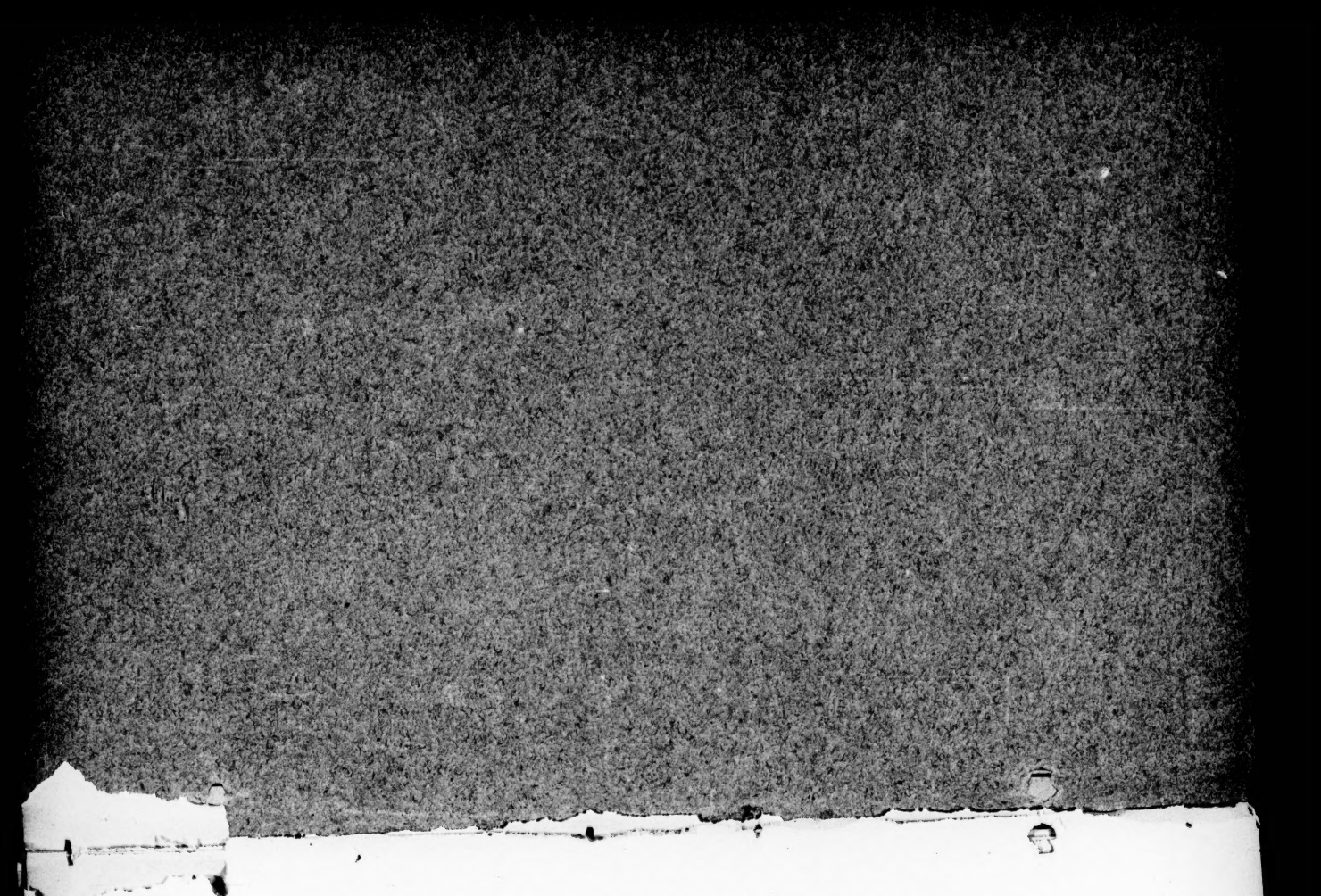
Here is a declaration by a Court certainly not partial to railway corporations, that it is the judicial and not the legislative department of the Government that must determine the question of what is a reasonable compensation. The Court will observe that the Wisconsin court held the particular

charter in question gave only a right to reasonable tolls, but that that question was a judicial one, and therefore the act as to the portion of the road covered by the charter under consideration was inoperative and void.

At a subsequent date, it was ascertained that the charter in question was not accepted until after the State Constitution was adopted, and the injunction was extended over the entire road.

I beg leave to say, in conclusion, that I understand all the railway charters in Minnesota, with one exception, resemble the charter before the Court, in the absence of an express grant of tolls. It will also be found, on examination, that many of the charters in the Eastern States are of the same character. The question presented to the Court thus affects not only the parties to this suit, but very much of the vast railway property of the country.

C. B. LAWRENCE,
Of Counsel for Plaintiff in Error.



AN OPINION

AS TO THE POWER OF LEGISLATURES OVER THE CHARTERS OF PRIVATE CORPORATIONS WHERE THE CONSTITUTION OF THE STATE PROVIDES THAT SUCH CHARTERS MAY BE "ALTERED FROM TIME TO TIME, OR REPEALED," AND ESPECIALLY RAILROAD CORPORATIONS.

BY

S. W. SANDERSON,

Counsel for the Central Pacific R. R. Co.

SAN FRANCISCO:
H. S. CROCKER & CO., PRINTERS AND STATIONERS,
1875.

AN OPINION

AS TO THE POWER OF LEGISLATURES OVER THE CHARTERS OF PRIVATE CORPORATIONS WHERE THE CONSTITUTION OF THE STATE PROVIDES THAT SUCH CHARTERS MAY BE "ALTERED FROM TIME TO TIME, OR REPEALED," AND ESPECIALLY RAILROAD CORPORATIONS.

BY

S. W. SANDERSON,

Counsel for the Central Pacific R. R. Co.

SAN FRANCISCO:
H. S. CROCKER & CO., PRINTERS AND STATIONERS,
1875.

SAN FRANCISCO, Oct. 10, 1875.

LELAND STANFORD,

President of the Central Pacific Railroad Company.

SIR:—In answer to your note of the 1st inst., requesting my opinion upon the question, whether the Legislature of a State, acting under a power to that effect, reserved in the Constitution of the State, can alter, amend or repeal a charter which it has granted to a private corporation, without the consent of the corporation, so as to impair the obligations of the charter, I have the honor to submit the following:

I.

The solution of the question depends upon the meaning of certain provisions contained in the Constitution of the United States, and certain provisions contained in the Constitution of the State. They are as follows:

FEDERAL CONSTITUTION.

ART. 1, Sec. 10. "No State shall * * * pass any bill of attainder, or ex post facto law; *or law impairing the obligation of contracts* * * *."

ART. 6. "* * *. This constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, *anything in the constitution or laws of any State to the contrary notwithstanding.*"

ART. 14, Sec. 1. "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;* nor deny to any person within its jurisdiction the *equal* protection of the laws; * * *."

STATE CONSTITUTION. (California).

ART. 1, Sec. 8. "* * * No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself; *nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.*"

ART. 4, Sec. 31. "Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. *All general laws and special Acts passed pursuant to this section may be altered, from time to time, or repealed.*"

II.

HISTORY OF THE QUESTION.

The history of this question, so far as it has been written, will contribute to a just appreciation of the views hereinafter taken.

In the year 1769 the British Crown, by special charter, created a private corporation, under the name and style of "The Trustees of Dartmouth College." The charter prescribed a form of government for the corporation and defined, with much particularity, its powers, jurisdictions, franchises, privileges, advantages, liberties and immunities. It was empowered, among other things, to acquire and hold lands for its use in the western part of the then province, now State, of New Hampshire, and to erect thereon such buildings as might be required for college purposes. The corporation was to have a perpetual existence. It was to be governed, and its affairs managed by a board of twelve trustees. *No power was reserved in the charter to alter, amend or revoke it.* Under this charter, the corporation of "The Trustees of Dartmouth College" was subsequently organized. It acquired lands and erected buildings thereon.

It carried out the objects of its creation by establishing a college, managing and governing its affairs according to the terms of its charter.

In 1816, nearly half a century after its creation, the Legislature of New Hampshire conceived the idea that it could improve the charter granted by the British Crown, and put the corporation upon a footing better adapted to the educational wants of the public. Accordingly, it passed an Act entitled "An Act to amend the charter, and enlarge and improve the Corporation of Dartmouth College." The Act entirely reorganized the corporation. In effect it created a new corporation under the style of "The Trustees of Dartmouth University," and endowed it with all the property, rights, privileges and franchises of the old corporation. The taking of effect of this Act was not made dependent upon the consent of the old corporation; on the contrary, the Act proceeded upon the theory that it was a legitimate exercise of legislative power. The old corporation did not accept the Act; on the contrary, it contested its enforcement. Thereafter, the legislature passed other Acts to aid in giving force and effect to the first, but the old corporation still denied the power of the legislature to disturb or interfere with its chartered rights. Finally, the new corporation was organized. To enable it to get possession of the books, titles and papers of the old corporation, it resorted to the expedient of appointing one Woodward, who had been holding the offices of secretary and treasurer under the old corporation, and, as such, had possession of the books, etc, to the same offices under the new corporation. Woodward accepted these

STATE CONSTITUTION. (California).

ART. 1, Sec. 8. "* * * No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself; *nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.*"

ART. 4, Sec. 31. "Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. *All general laws and special Acts passed pursuant to this section may be altered, from time to time, or repealed.*"

II.

HISTORY OF THE QUESTION.

The history of this question, so far as it has been written, will contribute to a just appreciation of the views hereinafter taken.

In the year 1769 the British Crown, by special charter, created a private corporation, under the name and style of "The Trustees of Dartmouth College." The charter prescribed a form of government for the corporation and defined, with much particularity, its powers, jurisdictions, franchises, privileges, advantages, liberties and immunities. It was empowered, among other things, to acquire and hold lands for its use in the western part of the then province, now State, of New Hampshire, and to erect thereon such buildings as might be required for college purposes. The corporation was to have a perpetual existence. It was to be governed, and its affairs managed by a board of twelve trustees. *No power was reserved in the charter to alter, amend or revoke it.* Under this charter, the corporation of "The Trustees of Dartmouth College" was subsequently organized. It acquired lands and erected buildings thereon.

It carried out the objects of its creation by establishing a college, managing and governing its affairs according to the terms of its charter.

In 1816, nearly half a century after its creation, the Legislature of New Hampshire conceived the idea that it could improve the charter granted by the British Crown, and put the corporation upon a footing better adapted to the educational wants of the public. Accordingly, it passed an Act entitled "An Act to amend the charter, and enlarge and improve the Corporation of Dartmouth College." The Act entirely reorganized the corporation. In effect it created a new corporation under the style of "The Trustees of Dartmouth University," and endowed it with all the property, rights, privileges and franchises of the old corporation. The taking of effect of this Act was not made dependent upon the consent of the old corporation; on the contrary, the Act proceeded upon the theory that it was a legitimate exercise of legislative power. The old corporation did not accept the Act; on the contrary, it contested its enforcement. Thereafter, the legislature passed other Acts to aid in giving force and effect to the first, but the old corporation still denied the power of the legislature to disturb or interfere with its chartered rights. Finally, the new corporation was organized. To enable it to get possession of the books, titles and papers of the old corporation, it resorted to the expedient of appointing one Woodward, who had been holding the offices of secretary and treasurer under the old corporation, and, as such, had possession of the books, etc, to the same offices under the new corporation. Woodward accepted these

offices, and thus, by a trick, the new corporation obtained possession of the books, etc., of the old corporation. Previous to his appointment by the new corporation, Woodward had been removed from office by the old corporation. The old corporation demanded possession of the books, etc., but Woodward refused to surrender them. Thereupon the old corporation brought an action for the books, etc, against Woodward. The action ultimately found its way to the Supreme Court of the United States, where it was finally decided in 1819. The old corporation contended that its charter was a contract, within the meaning of that clause of the Federal Constitution, which declares that "the States shall pass no laws impairing the obligations of contracts." That the several Acts, of the State of New Hampshire, in question, impaired the obligations of its charter, and they were therefore repugnant to the said clause of the Federal Constitution, and, therefore, null and void. Both points were sustained by the Court, and from that time to the present, it has been the settled law of the land, that the charters of private corporations, whether found in special Acts or in general laws, are contracts within the meaning of the Federal Constitution. It was also decided, in that and other cases, that in the presence of this clause of the Federal Constitution, a State stands upon no higher level than a private individual, and that a contract, to which a State is a party, is as fully under the protection of that instrument as a contract between two individuals. There is no reasonable ground to apprehend that these principles will ever be departed from, and in all discussions

of the present and cognate questions, they must be regarded as unalterably fixed and settled.

Dartmouth College *v.* Woodward, 4 Wheaton, 518.

Providence Bank *v.* Billings *et al.* 4 Peters, 514.

Chief Justice Marshall, Justices Washington and Story delivered separate opinions in the Dartmouth College case. In the opinion of Justice Story the following passage is found :

"In my judgment it is perfectly clear, that any Act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. *If the legislature mean to claim such an authority, it must be reserved in the grant.* The charter of Dartmouth College contains no such reservation ; and I am, therefore, bound to declare, that the Acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void."—(Page 712.)

This language implies, that if a power to alter amend or repeal had been reserved in the charter, the opposite result might have been reached, and the acts of the legislature of New Hampshire might not have been repugnant to the constitution of the United States. Acting upon this suggestion, it afterwards became the fashion for constitutional conventions and legislative bodies to insert, respectively, in State constitutions and in general and special statutes for the creation of private corporations, a clause reserving such a power. Hence has arisen the most important, if not the most embarrassing, judicial problem of the age.

There was nothing in the Dartmouth College case which called for such a remark, and it was therefore strictly *obitur dictum*, and is entitled to no more weight than the off-hand suggestion of any other eminent lawyer. Had Justice Story given the subject a sober second thought it is more than probable that he would never have written those lines.

III.

THE OBJECT AND MEANING OF THE RESERVATION.

The foregoing history of this question shows clearly the object and purpose which constitutional conventions and legislative bodies intended to accomplish by inserting this reservation in the constitutions and statutes respectively framed by them. Their sole purpose and object was to overcome and practically annul the rule announced in the Dartmouth College case. It was supposed that the rule in that case was pregnant with evil consequences—that it was a new Pandora's box, from which all manner of ills might escape and work mischief to the public well-being; and it was deemed necessary to guard against these apprehended mischiefs by providing some means by which corporations should be debarred, in the future, from the privilege of appealing to the protection of the Federal constitution against attacks upon their charters, should their rights and privileges under them become oppressive to the people. The means by which this might be done had been suggested by a judge of the highest court in the land, and they were adopted. The object and purpose, the intent and meaning of this reservation

cannot be disguised. It was to confer upon the States a power which they did not previously possess—a power which the Federal constitution had forbidden them to exercise. It was to erase from the Federal constitution the clause which declares the inviolability of contracts, so far as contracts in the form of charters of private corporations were concerned. It was to render *violable* that which the Federal constitution had declared should remain *inviolable*. It was to subordinate the Federal constitution, in the particular in question, to the will of the States, as expressed in their constitutions and their statutes; or, to put it in the language of its advocates, to subject the federal constitution, *pro tanto*, to the control of a higher instrument, to-wit, *a private contract*.

Had this power been reserved in the following language: "The Legislature shall have power to impair the obligation of all charters granted by them to private corporations without their consent," the purpose would not have been more obvious—the intent and meaning would not have been plainer.

That such is the object and meaning of this reservation, is further evident from the total absence from the case of any other rational object or motive. Unless it was intended to subserve the purpose suggested, what other purpose was there which it could have subserved? In that case, there was no purpose which could not have been accomplished without it, as well as with it. It certainly was not needed to enable the legislature to pass laws at the request of private corporations. It was not needed to enable legislatures to pass

laws which would benefit private corporations. It was not needed to enable the legislature to pass laws of a police nature to secure the safety of the public, or to coerce private corporations into a faithful and full performance of their obligations and duties under their charters, or to terminate the existence of the corporation, on account of non use or fraud or abuse, or to retake the franchises when they should become burdensome or oppressive, for that could have been done as now, under the power of eminent domain, or generally, to pass any laws which would not have had the effect to impair the obligations of charters, for without such a reservation the legislature could have passed any of those laws, for the Federal Constitution forbids *only* the passage of laws which will impair the obligation of contracts. As to all laws which will not have that effect, the States had been left to their own discretion untrammeled by the Federal Constitution.

In view of the history of the question and the only mischiefs supposed to exist, and to demand a remedy, after the Dartmouth College case, there can be no reason to doubt the object and meaning of the reservation in question. It was, as already stated, to enable the States to avoid the force and effect of the Federal Constitution. To enable the States to do precisely what the language of the reservation imports, *to alter or repeal* charters of private corporations, so as to retake their franchises, advantages and privileges without making any compensation therefor, or without resorting to the power of eminent domain—a remedy which is always open to the States where franchises have

been improvidently granted, and public convenience or need require that they be allowed to exist no longer. Such is its meaning, or it has no useful meaning at all. There is no middle ground. It does not mean less than its language imports. To hold that it does is to leave its meaning in doubt and uncertainty; still worse, it is to hold, that it has no practical, or necessary, or useful, or rational meaning whatever; and that it is a false quantity in all questions relating to the legislative power of the States over private corporations, for, as already stated, if it means less than a power to impair charters, it adds nothing to such power as previously existed.

IV.

WHAT THE COURTS THINK OF ITS MEANING.

Without some reference to what the courts have said in relation to the scope of this reserved power, any discussion of the question would be incomplete. Yet whoever undertakes to deduce from the decisions of the courts an intelligible, consistent and uniform rule upon this subject, will undertake a difficult task. In going over their decisions he will find that the courts have "blown hot and cold." Talking in a general and loose manner, they have repeatedly said, in effect, that if a power to alter, modify, or repeal charters of private corporations be reserved in a State constitution, or in a general law, older than the charter in question, or in the charter itself, a subsequent exercise of the power so reserved by the legislature, even against the consent of the corporation, is not a violation of the Federal Constitution, or, in other words, that a charter granted upon such a condi-

tion is not within the protection of the Federal Constitution. Such language seems to assume the meaning and object of the reservation to be, as stated above, to enable the legislature to make such changes in a charter as would impair its obligation within the meaning of the Federal Constitution. But whenever a case has arisen in which the power to do so is brought directly in question, we find the courts beginning to recede and to search for a meaning of less startling import. Then we are told that this power, which we have been led to suppose was without other limit than the discretion of the legislature, has in fact other limitations, but precisely what those limitations are we are not informed. An example of this uncertain and unsatisfactory interpretation is found in the case of Miller *v.* The People of the State of New York, decided by the Supreme Court of the United States. (15 Wallace, 478.)

In the case referred to, Justice Clifford, after going into a lengthy discussion of the general question, and apparently showing conclusively that, under this reserved power, the legislature may amend, alter or repeal charters *ad libitum*, he suddenly becomes alarmed at the appalling consequences to which the doctrine may lead. He suddenly perceives that the rule he is announcing, carried to its logical extreme, may lead to the destruction of fortunes, to the violation of contracts, to the despoiling of individuals, to the divesting of vested rights, in short, to nullification of some of the most salutary rules of constitutional law,

without which civilized society cannot exist. So, after showing that the power "to alter or repeal" exists, and without any apparent limitations or qualifications, he proceeds to show that it has some limitations nevertheless. He says:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, *is certainly not without limit*, and it may well be admitted that it cannot be exercised *to take away or destroy rights acquired by such a charter*, and which, by a legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets.

"Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

It is not a little surprising that so eminent a justice as Justice Clifford did not himself perceive that, in using the foregoing language, he virtually stripped the clause "to alter, from time to time, or repeal," of all meaning; for if the legislature cannot, under it, do the acts enumerated by him, and other like acts, then nothing remains to the doing of which the clause in question is necessary, for every act, which he affirms can be done under it, can be done without reference to it—can be done as fully and completely as if such a clause had never found a place in the English language; for, as I have already stated, those acts, and other like acts, are not within the prohibition of the Federal Constitu-

tion, for the obvious reason that they do not impair the obligation of the charter, and not being within that prohibition, the legislature had, as to them, plenary power, before the clause "to alter, from time to time, or repeal," had found a place in the law of the land.

Another example of these decisions is found in the case of Sage *v.* Dillard, (15 B. Monroe 340.) In that case it was held that a reservation in a legislative charter of a power to alter, repeal, or amend the same, does not imply the power to alter the vested rights acquired by the corporators under the charter, and to add new parties and managers *without the consent of the corporators.* And that such a reservation carries with it the necessary implication of a power in the corporators to accept or reject any amendment or alteration made by the legislature.

If such be the case, what does this reserved power amount to? In a legal or constitutional sense, of what value is it? If the implication mentioned exists, and the legislature can, therefore, do nothing, under the power, except by the consent of the corporators, what is there that it can do under it which it cannot do equally as well without it?

The case of Miller *v.* New York and Erie R. R. Co., (21 Barb., 513), furnishes another example. The defendant's charter did not impose upon it the burden of constructing new roads laid out across its track; but it contained a reservation of legislative power to alter, modify or repeal it. After the construction of defendant's road, an Act was passed providing that highways might be laid

out across the track of any railroad, without compensation to the corporation owning it, and requiring the railroad company to construct the crossing, under penalty for neglect. The Court held that the Act was unconstitutional in its application to the defendant—that the power reserved in the charter did not include the right to authorize the taking of their property without compensation.

The case of the Commonwealth *v.* Grey (13 Gray, 239) is another instance where it is shown that the clause in question does not mean what its framers intended it should mean, and what, *by its terms*, it does mean, if it means anything new, or different from what existed before its adoption. A mill company were required by their charter to construct and maintain sufficient fishways for the passage of fish up the stream, to be approved by the county officers, and they constructed such as were approved by those officers, but they afterwards proved insufficient, and the legislature subsequently granted the application of the company for an amendment to their charter, with a proviso that the company should indemnify all persons having fish rights which were injured by the dam. and the company accepted the act, and paid large sums of money for such damages. The Court held that this constituted a contract between the company and the State, such, that the legislature could not subsequently impose upon the company the duty of constructing new fishways, even though they had by a general law reserved power to annul and repeal all charters.

In delivering the opinion of the Court, Chief Justice Shaw said :

"Does this come within the power of the legislature to amend or alter? It seems to us that this power *must have some limit*, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchase such lot from a third person, could the legislature prohibit the company from holding it? If so, in whom would it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

"Suppose a manufacturing company, incorporated, is authorised to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assured and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

But in the case of Holyoke Company *v.* Lyman, 15 Wallace, 500, the opposite conclusion was reached, upon the ground that the statute requiring the construction of fishways was a legitimate exercise of the legislative right to regulate and conserve the public right of fishery. That such legislative right was an implied condition annexed to the grant of a right to build a dam, and accordingly such a grant was not impaired by subsequent legislation of such a character.

Numerous other decisions might be referred to, where the Courts have vainly attempted to define this reserved power, but they are all to the same effect as those which have been noticed. They all have this vice—they seemingly overlook the sole purpose for which this clause "to alter, amend or

repeal" has been incorporated in the law of the land, and having done this, they have failed to discover, that its true intent and meaning was to overturn the Federal Constitution, so far as it prohibits the States from impairing the obligation of charters, and that if it cannot be allowed to have that effect, it neither has, nor was intended to have any effect. Failing to give to it its true interpretation, they have attempted to assign to it a field of action for which it was not intended — a field which was already occupied, and in doing so, have involved the principal question in a sea of doubt and uncertainty. If any rational or consistent rule can be deduced from these decisions, it is this: that acting under this reserved power, the legislature can do no act which will injuriously affect the property, rights and franchises of the corporation, but may do any other act which will not have that effect. This emasculates the clause "to alter or repeal" and leaves it a dead letter in the law of the land, for all that can be done under it can be done without it, and the principal question is left to stand precisely where it stood when the Dartmouth College case was decided.

So far as practical results are concerned, it matters little whether the foregoing interpretation, or the one suggested by me, be adopted, for, as between them, there is no difference in respect to the consequences which follow; but if, in the matter of definition, precision and clearness are desirable, there can be no question as to which should be preferred. The one tends to show that the clause in question is merely superfluous, the other that it is unconstitutional, as well as superfluous. The

one is confused, vague and uncertain; the other plain and intelligible.

The true intent and meaning then of the clause "to alter from time to time or repeal," being, that the legislature may alter or repeal so as to predjudice the rights granted or acquired under a charter, without making compensation, and without the consent of the corporation, the next question is as to its true value as an element of State constitutional law.

V.

A STATE CONSTITUTION WHICH CONTAINS THIS CLAUSE, IS ITSELF, SO FAR, UNCONSTITUTIONAL.

1st. Because it is repugnant to that clause of the Federal Constitution which prohibits the States from "passing any law impairing the obligation of contracts."

2nd. Because it is repugnant to that clause of the Federal Constitution, which prohibits the States from "depriving any person of life, liberty, *or property* without *due process of law;* or denying to any person within their jurisdiction the *equal protection* of the laws."

AS TO THE FIRST GROUND.

Treating the clause "to alter or repeal" as being a *rule of law*, enough has been already said to establish the point, that it is repugnant to that clause of the Federal Constitution which affirms the inviolability of contracts. The Federal Constitution says: "No State shall pass any law impairing the obligation of contracts."

The State Constitution says: "The legislature may "alter from time to time, or repeal the charters (contracts) of private corporations."

When one person says: "You shall not," and the other replies: "I shall," it is evident that there is an "irrepressible conflict" between them.

But those who hold that this reserved power is constitutional, that is to say, not repugnant to the Federal Constitution, maintain that the clause in question is not a *mere rule of law*, but *a contract* between the State on the one side, and the corporation on the other; or, in other words, that it is a part of the charter; and, accordingly, when the State undertakes to alter or amend or repeal the charter, it is not acting as a law-maker, but as a party to the contract, and is not exercising a right which it possesses as a law-maker, but a right which it has acquired by *contract*, and possesses as an individual.

There are some who claim that a railroad corporation is only the naked agent or trustee of the State exercising a naked power, that is to say, a power not coupled with an interest, and which may, for that reason, be revoked by the State at any time. This doctrine will be considered hereafter.

That this contract theory is ingenious and plausible must be admitted, but that it is sound or tenable is denied. Upon a critical examination, it will be found that this theory, if it proves anything, proves too much, and must fall under its own weight.

This view concedes (which is true) that the State and the corporation stand upon a common level; that the State abandons its capacity of sovereign and becomes a mere individual, with the same, but no greater powers, in the premises, than the corporation. Upon this common ground, the

State and the incorporators meet. The latter say to the former: "We desire to obtain from you a charter under which we can organize ourselves into a railroad corporation, for the purpose of building and operating a railroad between A and B. We propose to purchase the right of way with our own money, and to construct, equip and operate the road at our own expense. In consideration of our doing all this, we ask you to grant us the right to use the power of eminent domain, and to agree that we may make certain charges in the nature of tolls, for travel and transportation over our road, and that the maximum of such charges be fixed in the charter, in order that there may be no misunderstanding about them hereafter." To this the State replies: "The public needs the road which you propose to build, and its construction will promote the public interest, and I will grant you the right to exist as a corporation, and to do business as a corporation, to make contracts, the same as a natural person, to sue and be sued by your corporate name, to acquire and hold such real and personal property as you may require for the purposes of your road, and that you may be able to exercise this right upon reasonable terms, I will grant you the right to use the power of eminent domain, also the power to borrow money upon bond and mortgage, and to compensate you for building and operating the road, I will grant you the right to collect reasonable tolls for the transportation of passengers and freight, say not to exceed ten cents per passenger per mile for the former, and fifteen cents per ton per mile for the latter, which charges I think are reasonable, and

I will allow you to exist as a corporation, and carry on the railroad business, upon these terms, for the period of fifty years. But if I make this agreement with you, that is to say, grant you this charter, the charter, when granted, will amount to a contract, which I cannot hereafter alter, modify or annul, so long as you faithfully observe it on your part, without your consent, which you may not give. To be frank with you, the Federal Constitution *prevents me from interfering with the charter*, to your prejudice, so long as you act in good faith, and perform all your obligations under it. Now I do not propose to be bound by the Federal Constitution in this matter. I may hereafter find that you have got the best of me in making this bargain, and I may want to turn the tables on you, and get even by changing the terms of the charter, and if such changes should impair the value of your property, or destroy your business, I am not willing to be obliged to pay you any damages which our own constitution would otherwise require me to pay. In short, you are to understand *that you are to be bound by this contract, but that I am not.*"

Such is a fair statement of the so miscalled contract. Nevertheless it is accepted, and the incorporators having organized and built the road with their own money, and the money of other parties which they have borrowed, and to secure which they have mortgaged their road and franchises; and having carried on the railroad business for a series of years, faithfully performing all their duties and obligations under the charter, the State, perceiving that the charter has proved to be profitable to the incorporators, and that they are making

money; or perceiving that the corporators have become powerful and have too much influence in politics, or that they think they have the same interest in a good and stable government—one which will protect all persons in the enjoyment of their lives, liberties and properties—that everybody else has; or that they have the right to vote for persons of their choice for office; or acting upon any other reason which wisdom or malice may suggest, concludes to curtail their profits, to crush their power, and thereupon passes a law cutting down their tolls to half a cent per mile for passengers and three-fourths of a cent per ton per mile for freight. To this the incorporators object, and say: We cannot carry on our business at such rates; we cannot pay the expenses of the business, nor the interest on our bonds, nor the principal thereof, nor ourselves any profit on the money which we have invested in our road and equipments. We shall have to quit the business, and all of our property, which is good for little or nothing unless it can be used in the business, will become lost to us, and our creditors will lose their money, for we shall be unable to pay them, nor, if the business is stopped, will they be able to make their money out of our property, for, unless it can be used in the business, it will bring little or nothing at a forced sale; besides, to secure them, we have mortgaged our right to the *tolls*, which you *agreed* we might charge, and which you *agreed* we might mortgage, and this law of yours will strip the security of all its value. Besides, we have entered into a number of contracts for the transportation of freight at certain rates, which are

not more than reasonable, yet, under this law of yours, we cannot collect them, but will have to do the work upon the terms of the new law, or pay heavy damages for non-performance of our contracts." To this the State replies: "What you have said is all true, but you must bear in mind that it was understood between us that I should have the right to do this. You must remember that it was expressly agreed that *you were to be bound by the charter, but that I was not.* It is true that this law will lessen the value of your property very much, and will destroy in a measure the security which your creditors have taken for their money, but still I cannot allow you to stop business. You have agreed to carry on this business for fifty years, and the stoppage of the business would be ruinous to my people. They cannot do without your road. Hence I shall not allow you to stop operating it. If you do, I will put my Courts on your track, and direct them to go after you with an injunction, or a mandamus, or a decree for specific performance, or some other writ, process, proceeding or decree known to the law, and compel you to operate your road according to the terms of the new law; and if you refuse to do so, I will direct them to go after you with an attachment for contempt of court, and, if you still continue disobedient, I will cause them to issue a commitment and send you to jail, there to remain until you declare a willingness to obey the law. This may seem hard to you, but I must have my 'pound of flesh,' no matter how much you may bleed, for 'it is so nominated in the bond.' If you grumble at this, I will repeal your charter, and leave you

and your creditors to extricate yourselves from whatever situation the repeal will leave you in, the best way you can. In that case, I do not know what will become of your property, or what remedies your creditors will have to get their money. Under the common law, you being dead, which you would be if I repeal your charter, your property would escheat and all come to me, which would be a very good thing for me. But it may be that this harsh rule of the common law has been relaxed in this country, where the enlightened progress of the people has suggested the necessity for more efficient protection to the rights of property. In either case, I shall leave the matter in the hands of my judges to determine, if they can."

Such is a fair statement of the nature and results of the only plausible theory upon which the constitutionality of this reserved power is sought to be maintained. It will not do to say that the picture is overdrawn, or that the case supposed will never arise. It has already arisen, substantially in the State of Wisconsin. Besides, we are dealing with a question of legislative power—with a legal principle, and in the language of Chief Justice Shaw, "Extreme cases are allowable to test a legal principle." If the power exists at all, it exists to the extent supposed, and the recent proceedings in Wisconsin justify the apprehension that it may be exercised at any time to its full extent.

In view of the pernicious consequences which attend upon the exercise of this reserved power, it is a matter of wonder, that its existence has ever become a mooted question, especially in a country

where so much care has been taken to make the security of property and the inviolability of contracts the corner stones of the social compact. Yet, strange as it may seem, such is the case, and men of learning and ability are found, who, in apparent good faith, argue for the existence of this power, and insist that all of these consequences may follow its exercise, *without a violation of constitutional law;* and even judges are found who solemnly declare that such acts are not forbidden by the paramount law of the land.

In view of such conditions private corporations may well exclaim: "Oh! for a modern Portia to teach this modern Shylock that he has overreached himself"—to say to him, "yes, you shall have your pound of flesh, for it is so nominated in the bond, but not one drop of blood;" you may "alter from time to time, or repeal" this charter, for it is so written in the charter. Alter or repeal it, but, in doing so, see to it that you take not one dollar of property, that you do not impair the obligation of a single contract, for it is also written in the charter that you shall not impair the obligation of a contract, or take private property for your use without making just compensation, or deprive any person of his property without due process of law."

One of the most remarkable anomalies, involved in this contract theory, is that an act which would be unconstitutional, otherwise, may be made constitutional by force and effect of a *private contract.* It concedes that a power contained in a State Constitution to impair a contract is unconstitutional, but insists that if the power be transferred to the contract, it, *es instanti,* becomes constitutional;

or, in other words, that the Constitution of the United States is not a fixed and unchangable rule for the determination of private rights, duties and obligations, but that its provisions may be altered, or even entirely set aside, by a convention to that effect between private parties. If the Federal Constitution, in the particular in question, may thus be made the subject of trade and traffic between States and their citizens, what is there to prevent them from agreeing between them—the State as one party, and the people of the State as the other party—that, as to all internal matters, the entire Federal Constitution shall become a dead letter, and the Constitution of the State, and the statutes made in pursuance thereof, shall be the sole rule of decision in all controversies? Certainly if one clause of the Federal Constitution may be set aside by a private contract, by parity of reason, the next in order may be set aside, and so on to the end of the list, and the future historian, who searches for the constitution of the country, cannot safely confine his search to the public archives; he must extend his examination to the private papers of the people of the country, and ascertain from them how far the Constitution has been modified, or suspended, *by private contracts.*

If a State has the power to nullify this clause of the Federal Constitution, in the case of charters of private corporations, no one will deny to it the power to do so in respect to all its contracts, whether made with corporations or natural persons. It can incorporate such a clause into every grant of lands, franchises and privileges made to natural persons, and afterwards convert a fee sim-

ple into a tenancy at will, or terminate the estate, franchise or privilege, and thus destroy in a measure the ends and objects of government, and take from its grantees the very rights which governments are organized to protect and defend.

Another remarkable anomaly in this contract theory, is, that a contract may be binding upon one party and not upon the other. It has always been supposed that a contract can exist only where both parties are bound by its terms, unless the case in hand forms an exception to the rule. It must be logically true that where one of the parties reserves the right to alter or rescind the contract, without legal cause therefor, and without the consent of the opposite party, the obligation created by the contract is not mutual. Nor is the obligation made mutual by the fact that this reserved right of the one party is assented to by the other. Where such conditions are found there is either no contract at all, or the reserved right constitues no part of the contract, but is extrinsic, and, by itself, constitues only a *naked agreement*, without consideration, out of which no cause of action can arise.

Another anomaly of this contract theory is, that it recognizes a capacity in the citizen to trade away his right to appeal to the Federal Constitution for that protection which it affords to his property and other rights. The right to so appeal is inalienable. It is a right which the public, as well as the individual, is interested in maintaining. The opposite doctrine is hostile to the idea of government, and subversive of its ends and objects.

Trial by jury is not more inestimable than the inviolability of contracts. Suppose that a State should insert a proviso, in the charter of a private corporation, that all disputes arising in the business of the corporation, or affecting its rights of property, should be submitted to arbitration, or to the decision of a judge acting without a jury, is any one prepared to assert that such a proviso, though expressly assented to by the corporation, would be binding upon it, and that when brought into Court, for any cause, it would be thereby precluded from demanding a jury, notwithstanding the Constitution declares that "the right of trial by jury shall be secured to all, and remain inviolate for ever."

Suppose a State should pass a law to the effect, that no private corporation of another State should be permitted to transact business in the State, unless it first appoints an attorney, in the State, on whom process of law can be served, and agrees that it will not remove any action that may be brought against it in the Courts of the State into the Federal Courts for trial; and suppose a corporation of another State should accept this condition, and appoint an attorney, and agree not to remove any action brought against it in the Courts of the State to the Federal Courts for trial, would such a statute or agreement be binding upon the corporation and prevent it, when sued in the State Courts, from appealing to the Federal Constitution and the laws made in pursuance thereof, and demanding that the action be transferred, as therein provided, to the Federal Courts for trial?

This question has been recently answered, *in the negative*, by the Supreme Court of the United States.

In 1870, the legislature of the State of Wisconsin passed a statute to the following effect:

"It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or foreign government, for any of the purposes specified in this Act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this Act; and any such company desiring to transact any such business, as aforesaid, by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law may be served, containing *an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal Courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another be substituted.*"

This statute being in force, the Home Insurance Company, a corporation formed under the laws of the State of New York, being desirous of engaging in business in the State of Wisconsin, established an agency there, and in compliance with the provisions of said statute, filed in the office of the Secretary of State of Wisconsin an appointment of H. S. Durand as their agent in it, on whom process might be served. This power of attorney contained the following clause:

"And said company agrees that suits commenced in the State Courts of Wisconsin shall not be removed, by the acts of said company, into the United States Circuit or Federal Courts."

Being thus established in the State, the Company issued a policy of insurance, and a loss having occurred under it, an action thereon was brought against the Company in one of the State Courts. The Company entered an appearance, and moved that the action be transferred for trial to the

Circuit Court of the United States, pursuant to the provisions of the twelfth section of the Federal Judiciary Act of 1789. The section under which the Company demanded the removal is as follows:

"If a suit be commenced in any State Court * * * by a citizen of the State in which the suit is brought, against a citizen of another State * * * and the defendant shall at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending * * * and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing * * * it shall then be the duty of the State Court to accept the surety and proceed no further in the cause."

The Court denied the motion for a removal. The case was tried and a judgment against the defendant was rendered. The Company appealed to the Supreme Court of the State, which affirmed the judgment, holding that the statute of the State, and the agreement of the Company under it, were not repugnant to that clause of the Constitution of the United States, which declares "that the Constitution of the United States, and the laws made by Congress in pursuance thereof, shall be the supreme law of the land," and hence they were, therefore, binding upon the Company. Not satisfied with this solution of the question, the Company took the case to the Supreme Court of the United States, where it was decided at the last term of that Court. That Court, in an elaborate and well considered opinion, delivered by Mr. Justice Hunt, reversed the judgment of the Supreme Court of Wisconsin, holding that the statute and agreement, in question, were repug-

nant to that clause of the Federal Constitution which declares the Constitution of the United States, and the laws made in pursuance thereof, the supreme law of the land. The points decided were :

"1st. The Constitution of the United States secures to citizens of another State than that in which the suit is brought, an *absolute* right to remove their cases into the Federal Courts, upon compliance with the terms of the Act of 1789.

"2d. The statute of Wisconsin is an *obstruction* to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the Insurance Company *derives no support from an unconstitutional statute* and is as void as it would be *had no such statute been passed.*"

Insurance Company *v.* Morse, 20 Wallace, 445.

The question involved in that case differs from the question under consideration in circumstance, but not in principle. The solution of each turns upon the power of a State to set aside the Federal Constitution by force of a convention between itself and a citizen, which it erroneously calls a contract. If we look to the comparative merits of the two questions, the question under discussion must be conceded to be of vastly the most importance. Whether a citizen is entitled, under the Federal Constitution, to have his contracts, or his rights and liabilities under them, litigated and determined in the Federal Courts instead of the State Courts, is a question of minor importance to the question whether he shall be allowed at all, in either forum, to invoke the protection of the Federal Constitution against a violation of his rights under it. The former

merely involves a choice of forums, the other involves a principle—the right to appeal at all, in any forum, to the protection which the Federal Constitution professes to afford him in a matter of vital importance.

If, as the Court holds, the statute of Wisconsin was unconstitutional because it obstructed the defendant in the exercise of a right secured to him by the Federal Constitution, by parity of reason, the constitution of a State which contains the clause "to alter or repeal," is also unconstitutional, because it obstructs private corporations in the enjoyment of a still greater right secured to them by the Federal Constitution.

If, as the Court holds, the agreement of the defendant derived no support from the unconstitutional statute of Wisconsin, by parity of reason, the agreement in question, of private corporations, derives no support from an unconstitutional provision in a State Constitution; for, as all admit, State constitutions and State statutes stand upon a common level in the presence of the Federal Constitution.

If there were no other grounds upon which to combat this contract theory, it must be held untenable upon grounds of public policy alone. In Fletcher *v.* Peck (6 Cranch. 135), Chief Justice Marshall said: "It may be doubted whether the *nature* of society and of government does not prescribe some limits to legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is familiar law that a contract or promise

to do an act which is forbidden by law, or to omit to do an act enjoined by law, is illegal and will not support an action. In this case the Federal Constitution declares that the obligation of contracts shall not be impaired. The declaration has its origin in that broad public policy which underlies all laws, be they constitutions or statutes; a policy which all constitutions and all laws are made to administer. Public policy requires that the obligation of contracts shall be inviolable. That policy finds expression in the Federal Constitution: "No State shall pass any law impairing the obligation of contracts." This policy is attempted to be defeated by a State Constitution or a State law, it is immaterial which, or by a contract between the State and a large class of individuals existing in the form of bodies politic and corporate. It is agreed between them that the State may do precisely what the paramount law forbids. That such an agreement defeats, so far, the public policy which dictated the prohibition, is manifest; and that it is, for that reason, illegal and void is equally manifest.

This contract theory develops still another anomaly in the law of contracts. It is said that the right of the legislature to "alter or repeal" does not result from a rule of law, but is created by private convention between the State and incorporators, and that when the State undertakes to exercise it, it does not act as a sovereign, or lawmaker, but as a contracting party—that it does not enact a rule of law, but acts merely in performance and pursuance of a contract. The agreement claims more than the facts of the case

will justify, and if it proves anything proves too much.

The clause in question cannot be considered, in any just sense, as constituting a part of the subject matter of the contract. That is exhausted when the building and operating of the road on the one side, and the granting of the power of eminent domain, the right to collect tolls, and other franchises, on the other side, have been provided for. It is true, that in a certain sense, this clause enters into and becomes a part of the charter; but it is in the same sense, and in no other sense, in which all laws relating to contracts enter into and become a part of such contracts. Contracts are made with *reference* to the law, but not to determine what the law shall be. Besides, if the clause "to alter or repeal" enters into and becomes a part of the charter of a private corporation, by parity of reason, the clause that "no State shall pass any law impairing the obligation of contracts," also enters into and becomes a part of the charter; and so of the clauses "private property shall not be taken for public use without just compensation," and "nor shall any State deprive any person of life, liberty, or property without due process of law." Yet no one will claim that these latter clauses enter into a contract as a subject of convention between the parties. They are all mere rules of law by which the contract is governed, and the rights of the parties are to be determined, in case controversies shall arise. To speak of them as constituting a part of the contract, in the sense of this contract theory, is to confound the subject matter of con-

tracts with the rules of law providing for making, interpreting, and enforcing contracts. It is an insult to the average intelligence of the commercial world, and a reproach to the law, to call such an agreement a contract. It is a mere pretext on the part of the State for an atrocious violation of private property—a violation forbidden by the Federal Constitution—forbidden by every principle of natural justice.

The falacy of the doctrine, that a citizen has capacity to thus trade away the rights which have been guaranteed to him by the Federal Constitution, may be further illustrated.

The Federal Constitution declares that "the right of the people to keep and bear arms shall not be infringed;" that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." No one will claim that a citizen, upon whatever consideration, has capacity to make a contract which, if valid, would debar him from the right to bear arms for the defense of his person or property; or that he may by contract consign himself to the condition of slavery; yet the right of self-defense, or the right to defend one's property, or to be secure in the freedom of his person, if of greater importance than the obligation of his contracts, are so only in degree. Indeed, the inviolability of contracts may be said to be incidental and indispensable to the complete exercise of the right to acquire, possess, and enjoy property, and if the citizen has any rights, under the

Federal Constitution, which he cannot trade away, which are inalienable, the inviolability of contracts must be classed among them. Speaking to the question in hand, in Fletcher *v.* Peck, 6 Cranch, 87, the Supreme Court of the United States has said:

"Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions, on the legislative power of the States are obviously founded on this sentiment: *and the constitution of the United States contains what might be deemed* A BILL OF RIGHTS *for the people of each State.*"

While the constitution of the United States does not, in terms, contain a bill of rights, yet, as stated above, the prohibitory clauses of that instrument properly fall within the scope and purpose of a bill of rights, where the bill of rights is resorted to for the purpose, in part, of framing a constitution. Thus, the clauses of the Federal Constitution in relation to religion, freedom of speech and the press, the right to bear arms, billiting soldiers in time of peace, unreasonable seizures and searches, bills of attainder, *ex post facto* laws, laws impairing the obligations of contracts, taking private property without due process of law, slavery or involuntary servitude, and the right of suffrage, all fall within the perview of a bill of rights, and, where a bill of rights is employed, are universally included in it. Hence, as remarked by the Court, in Fletcher *v.* Peck, for all the

purposes of construction, they are to be considered as constituting a bill of rights for the people of each State, and the rights of citizens under them are to be considered as immutable and *inalienable*. The action of a State in inserting in its constitution, or its general or special statutes, in relation to the formation of private corporations, the clause "to alter or repeal," is an attempt to abridge these inalienable rights, so far as that clause authorizes legislation which will have the effect to impair the obligation of charters, and to that extent, at least, it is unconstitutional and void.

My conclusions upon this branch of the general question are:

1st. That the power "to alter from time to time or repeal" the charter of a private corporation reserved, in a State constitution or statute, is intended to enable the State to do indirectly what it cannot do directly, to-wit, impair the obligations of charters of private corporations.

2d. That, such being its true interpretation, it is repugnant to that clause of the Federal constitution which prohibits the States from passing any laws impairing the obligation of contracts, or;

3rd. If, as the decisions of the Courts imply, it is to be interpreted as also enabling the State to pass laws, in relation to private corporations, which do not impair their charters, that, then, it is unconstitutional as to the former, and superfluous as to the latter, and ought therefore to be considered as a false quantity in all attempts to define the power of legislative bodies over private corporations.

4th. That the argreement of the incorporators

that the State may "alter or repeal" their charter derives no support from such unconstitutional provision in a State constitution, and is therefore *nudum pactum*, as much so as it would have been had no such power been reserved.

5th. That the reservation by the State and the agreement by the incorporators, taken together, are repugnant to the Federal Constitution, and must be so held by the Courts so long as the maxim obtains that what cannot be done *directly* cannot be done *indirectly*.

Before leaving this branch of the question, it is proper to say that the foregoing conclusions do not deny to the State the exercise of its *police* power over private corporations. In respect to such power, private corporations stand upon the same level as natural persons, in respect to both obligation and immunity. Nor do they deny to the State the power to pass any laws which may have merely the effect to secure the safety of passengers and freights, or generally to enforce upon corporations an observance and performance of all their duties and obligations under their charters, or to prevent non-user or mis-user of their franchises. The States had this power before the power "to alter or repeal" was reserved, and they have it still. In the matter of legislation, they can go as far as they could have gone prior to the adoption of this reservation, but can go no further.

AS TO THE SECOND GROUND.

In Bartemyer *v.* Iowa, 18 Wallace, 129, the Supreme Court of the United States, speaking of the Fourteenth Amendment of the Federal Consti-

tution, has said: "It has become the fundamental law of this country that life, liberty and property (which include 'the pursuit of happiness') are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether *national or local*, so that he cannot be deprived of them without *due process of law*."

The expression "due process of law" has been incorporated into all American constitutions, but it is no where defined. It was borrowed or inherited from *Magna Charta*. It is found in the provision of that instrument by which the Barons of England extorted from King John a royal pledge that the right of trial by jury should remain inviolate forever. The language of *Magna Charta* is: "*Nec super eum ibimus, nec super miltimus, nisi per legale judicium parium suorum, vel per legem terræ*" —(Neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, *or by the law of the land*). Lord Coke says that these latter words, "*per legem terræ*" (by the law of the land), mean "*by due process of law*;" that is, without due presentment or indictment, and being brought in to answer thereto, by due process of the common law. "So that," says Judge Story, "this clause in effect affirms the right of trial according to the process and proceedings of the common law." Instead of the phrase, "by the law of the land," which was used in *Magna Charta*, the phrase employed by Lord Coke in defining its meaning has been substituted in American constitutions. It has been incorporated in the Federal Constitution "to protect the citizen against oppressive

legislation, either national or local;" and its meaning is that he shall not be deprived of his life, liberty or property *by the mere force and effect of an act of legislation*, but only by the process and judgment of the Courts, after a trial according to the course of the common law.

In Wynehamer *v.* The People, 13 N. Y. 392, Mr. Justice Comstock, speaking of the meaning of these constitutional phrases, "the law of the land" or "due process of law," said:

"No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—*not by an act of the legislature*, but in the due administration of the law itself, before the judicial tribunals of the State. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be *created* by a legislative act which *aims at their destruction*. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, *although a process and a tribunal* are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, *then the* legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed, by the Constitution, in the category with liberty and life."

Speaking to the same question, in Norman *v.* Hirst (5 Watts. & Serg, 193) Chief Justice Gibson, of Pennsylvania, said:

"What law? Undoubtedly a pre-existing rule of conduct, not an *ex post facto* rescript or decree made for the occasion. The design of the convention was to exclude *arbitrary power* from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were to take effect *in the form of a statute*. The right of property has no foundation or security but the law; and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more."

And in case of Taylor *v.* Porter (4 Hill, 145) Chief Justice Bronsen, discussing this question, said:

"The words 'law of the land,' as here used, do not mean a *statute* passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. * * * The meaning of the section, then, seems to be, that no member of the State shall be disfranchised of any of his rights and privileges, unless the matter be adjudged against him upon trial had, according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. *It cannot be done by mere legislation.*"

Chancellor Kent says: The better and larger definition of *due process* of law, is, that it means law in its *regular course of administration through Courts of Justice.*" (2 Com. 13).

It is clear, then, that any act of legislation which, under the pretext of altering or repealing the charter would have the effect to deprive a private corporation of its property, would be unconstitutional and void. This brings me to the question as to what legislative acts will deprive a

private corporation of its property, and incidentally as to what constitutes the property of a private corporation, within the meaning of this constitutional provision. For the purposes of my argument, I shall, as I have done heretofore, take the case of a railroad corporation.

WHAT IS THE PROPERTY OF A CORPORATION.

That the right of way, the superstructure of ties and iron rails, engines, cars, shops, depots and stations of a railroad company are property, is a matter of common learning. There is another kind of property possessed by railroad companies, the existence and nature of which are not so well understood, to-wit: their privileges and franchises. The former, with the exception of the right of way, are corporeal hereditaments; the latter, including the right of way, are incorporeal hereditaments. The latter are derived from the government, and from that fact the popular or unprofessional mind has adopted the erroneous impression that the power of the legislature is greater in respect to them than in respect to corporeal property. "Franchise" is a word of large signification, and is defined to be "a royal privilege in the hands of the subject." Change the terms of the definition to suit the conditions of our forms of government, and a franchise is a governmental privilege granted to and vested in individuals. They do not belong to citizens generally, by common right, and who ever claims a right to exercise them must show a grant from the government. The principal franchises of a railroad corporation are, the right to be a corporation, the right to use the power of eminent domain, the right to construct and operate a rail-

road or highway, and the right to collect tolls of persons who travel over the road, or use it for the transportation of their property, or goods, from one place to another. These rights and privileges are valuable, in law, and when vested in corporations or natural persons, become property. Speaking of franchises, Chancellor Kent says:

"Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of the subject. *They contain an implied covenant on the part of government not to invade the rights vested*, and on the part of the grantors to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for the public accommodation, and to be affected with a *jus publicum*, and they are necessarily *exclusive* in their character. The government *cannot resume at pleasure*, or do any act *to impair the grant*, without a *breach of contract*. The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are liable to answer in damages, if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare. The obligation between the government and the owner of such franchises is mutual. * * * *An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.*"

Speaking to this question, in the Dartmouth College case, Mr. Justice Story said:

"In respect to franchises, whether corporate or not, which include a permanency of profits, such as right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank, or bridge, there is no pretence to say that grants of them are not *within the constitution*. Yet they may in point of fact be of no exchangeable value to the owners. They may

private corporation of its property, and incidentally as to what constitutes the property of a private corporation, within the meaning of this constitutional provision. For the purposes of my argument, I shall, as I have done heretofore, take the case of a railroad corporation.

WHAT IS THE PROPERTY OF A CORPORATION.

That the right of way, the superstructure of ties and iron rails, engines, cars, shops, depots and stations of a railroad company are property, is a matter of common learning. There is another kind of property possessed by railroad companies, the existence and nature of which are not so well understood, to-wit: their privileges and franchises. The former, with the exception of the right of way, are corporeal hereditaments; the latter, including the right of way, are incorporeal hereditaments. The latter are derived from the government, and from that fact the popular or unprofessional mind has adopted the erroneous impression that the power of the legislature is greater in respect to them than in respect to corporeal property. "Franchise" is a word of large signification, and is defined to be "a royal privilege in the hands of the subject." Change the terms of the definition to suit the conditions of our forms of government, and a franchise is a governmental privilege granted to and vested in individuals. They do not belong to citizens generally, by common right, and who ever claims a right to exercise them must show a grant from the government. The principal franchises of a railroad corporation are, the right to be a corporation, the right to use the power of eminent domain, the right to construct and operate a rail-

road or highway, and the right to collect tolls of persons who travel over the road, or use it for the transportation of their property, or goods, from one place to another. These rights and privileges are valuable, in law, and when vested in corporations or natural persons, become property. Speaking of franchises, Chancellor Kent says:

"Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of the subject. *They contain an implied covenant on the part of government not to invade the rights vested*, and on the part of the grantors to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for the public accommodation, and to be affected with a *jus publicum*, and they are necessarily *exclusive* in their character. The government *cannot resume at pleasure*, or do any act *to impair the grant*, without a *breach of contract*. The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are liable to answer in damages, if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate of fare. The obligation between the government and the owner of such franchises is mutual. * * * *An estate in such a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.*"

Speaking to this question, in the Dartmouth College case, Mr. Justice Story said:

"In respect to franchises, whether corporate or not, which include a permanency of profits, such as right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank, or bridge, there is no pretence to say that grants of them are not *within the constitution*. Yet they may in point of fact be of no exchangeable value to the owners. They may

be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices, or *franchises*, or other rights, are deemed *valuable* in law. The owners have a legal *estate* and *property* in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseizin of them. * * * In respect to *corporate franchises*, they are, properly speaking, *legal estates* vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation; *but powers coupled with an interest.* The property of the corporation rests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied, *that the corporation itself has a legal interest in them.*"

Let us contrast this logic with the logic of those who contend that under a reserved power "to alter or repeal" the legislature may take the property of railroad companies without compensation. Their argument is clearly stated by Senator Carpenter in his speech delivered at Ripon, Wisconsin, on the 16th of September, 1874, upon "the power of legislatures to govern corporations of their own creation." In answer to the claim of the railroad companies, that the legislature cannot alter their charters so as to prejudice their rights, property, and franchises, he said:

"The first, and fatal falacy, in the argument which railroad companies make in support of this proposition, is in assuming that corporations have *indestructible rights* like *natural* persons. The rights and privileges with which God has endowed every individual man, *he cannot part with by contra t*, nor can they be wrested from him without a violation of natural justice, which is the basis of all law and the foundation of all rightful government. Corporations, as they are recognized by our laws, are creatures of man, and only of man. It is absurd to say that corporations have any natural rights; that is rights not derived from the law, *rights the law cannot take away.* Corporations are mere human contrivances, and so far as natural rights are concerned, as

subject to the power which created them as a house is subject to the will of its builder or owner. The power which creates a corporation is as absolute as the power of the potter over common clay. 'Hath not the potter power over the clay, of the same lump, to make one vessel unto honor and another unto dishonor?' The Scripture sustains the 'Potter law!!' (The *pun* is better than the logic.) * * * God gives and may take away the life of a man. *The law gives and may take away the existence of a corporation.* * * * The State takes the land from its citizens for the purpose of constructing thereon an iron rail highway; and creates a corporation to hold the title, build the road, and operate it *as the agent of the State.* It is the State which takes, and the State which is all the time holding the land; the corporation is the *mere agent* or *medium* through which the State acts in taking and holding the land, and in operating the railroad. Every act performed by the company, from the first breaking of ground, for the construction of the road, to the collection of tolls on operated trains, *is an act performed by the company for the State,* performed as the *agent* of the State, by express authority from the State—*authority which the State may at any time recall.*"

Such is the monstrous doctrine to which the advocates of this legislative power are compelled to resort to sustain it. Yet it is apparent that they cannot stop short of the extreme to which they go without failing to sustain the power. The argument is, that the corporation possesses a mere naked power, in the premises, which it exercises *exclusively* for the benefit of the State. Undoubtedly, if such be the character of the power, the State may revoke it at any time. But such is not its character—the power is coupled with an interest vested in the corporation—the power is to be exercised by the company in aid of a right vested in it by the State. That, where such are the conditions, the power is irrevocable, is familiar law.

The argument was not new with Senator

Carpenter. It was made in the Dartmouth College case, and its fallacy was exposed by Mr. Justice Story, in the following language:

"In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or *property*, the counsel for defendant are driven to contend that the corporators or trustees are *mere agents* of the corporation, in whom no beneficial interest subsists; and so nothing but a naked power is touched by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, *but having no interest in them* which can be the subject of contract. *Neither of these positions is admissible.* The former has already been sufficiently considered and the latter may be disposed of in a few words. *The corporators are not mere agents, but have vested rights in their charter as corporators.*"

Instead of the relation of a railroad company to the property and franchises in its possession, being that of a naked agent, as claimed by Senator Carpenter, it is analagous to the case of an owner holding his estate charged with a servitude in favor of the State. The State has a right to use it, upon the terms specified in the charter, and has no greater or other interest in it. A corporation is not the mere creature of the State, holding its existence and its rights at the mere will and pleasure of the State. It has the same power, within the limits of its charter, to acquire and hold property to *its own use* that a natural person has. It has the same right to the years allotted to it by its charter, that a natural person has to his three score and ten. For its property and its existence it is entitled to the same protection, under the constitution, which is accorded to a natural person; and can, no more than a natural person, trade away or divest itself of that protection.

DEPRIVATION OF PROPERTY.

Having shown that corporate franchises are property within the meaning of the Federal Constitution, the next question to be considered is,—what acts on the part of a legislature will amount to a deprivation of property within the meaning of the constitutional provision in question.

Suppose the legislature should repeal the charter of a railroad corporation, would the repeal deprive the corporation of its property in the sense of the Federal Constitution?

Instead of repealing its charter, suppose the legislature should alter it by reducing the maximum rate of toll established therein, would the change have the effect to deprive the corporation of its property in the sense of the Federal Constitution?

The only rational answer that can be given to either of these questions is in the affirmative.

The theory of the English government is, that parliament is omnipotent, and hence it has been held in England, that the charter of a private corporation may be repealed, or in other words, the corporation dissolved, by a mere act of parliament. Yet the exercise of a power, so repugnant to everybody's sense of natural right, has only twice found a place in the history of England; one was the suppression of the Order of Templars in the time of Edward the Second, and of the religious houses in the time of Henry the Eighth. When, in 1783, it was proposed by act of parliament to remodel the charter of the East India Company, the measure was strenuously opposed by Lord Thurlow and Mr. Pitt. The former denounced the measure as being not only a violation of the charter of the

Company, but a violation of the Constitution of England. He characterized it as "an atrocious violation of private property, *which cut every Englishman to the bone.*" (Angell & Ames on Corporations, § 767.)

Would Lord Thurlow have thought it a less atrocious violation of private property, had it been provided for by an act of parliament older than the charter of the Company, or in the charter itself? Would the bill, in that case, have been, in his judgment, less subversive of the fundamental law of England? Would the character of the bill have been intrinsically changed, had it been previously provided by an act of parliament, that this atrocious violation of private property might be perpetrated? It is believed that no previous act of parliament, to that effect, would have lessened, in his judgment, the atrocity of the bill, or rendered the proposed violation of private property less likely to "cut every Englishman to the bone." The idea that the atrocity of such a violation of private property is mitigated, or wholly removed, by a prearrangement to that effect, has been left to find development in American statemanship, where the written law forbids what the unwritten law of England permits, but what, nevertheless, an Englishman's love of natural justice forbids him to tolerate.

A like view of the nature of such a measure was taken in France, in 1786, in the discussion which arose on the new charter then recently granted to the French East India Company. Those opposed to the charter denied the legal existence of the Company, on the ground that the king had

been surprised into making the grant; that the grant was not yet perfected by the issuing of letters patent, nor duly registered by the parliaments; and that it might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy.

On the part of the Company, it was contended that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old Company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was, at the time, solemnly protested against by the parliament of Paris as illegal); that their new grant might still be perfected by letters patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested as a *right of property*, of which they could not be *depriced* by any authority in the kingdom. But it was agreed by the contending parties that if the charter had *regularly* issued according to the forms of the French law, it was *irrevocable*, unless forfeited for nonuser or misuser. (4 Wheaton, 713—note.)

The same wholesome doctrine prevailed in this country until the reservation of the atrocious power to "alter or repeal." In Territ *v.* Taylor, (9 Cranch, 43), the Supreme Court of the United States said:

"A private corporation created by the legislature, may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government under a *judicial judgment* upon a *quo warranto* to ascertain and inforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. * * *.

But that the legislature can repeal statutes creating private corporations, or confirming to them *property* already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they please, without the consent or default of the corporators, *we are not prepared to admit;* and we think ourselves standing upon the *principles of natural justice*, upon the *fundamental laws* of every *free* government, upon the spirit and letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

These authorities proceed upon the idea that the revocation or repeal of a private charter is a divisture of property. That it is, is obvious. Upon the repeal of the charter, the corporation ceases to exist, and there being no successor to take, at common law, the property escheates and vests in the State; and if the State should provide for its distribution among the creditors until their claims are satisfied, and a distribution of the surplus, if any, among the stockholders, the divesture would be no less complete. A State has no right, by a mere act of legislation, to take the property of A and give it to B, even in payment of a debt, nor to distribute it among parties who may have an equitable interest in it, and either is as complete a divesture as if the State should appropriate the property to its exclusive use.

It is no less clear that a reduction of the maximum rates of toll would be also a divesture. In that case the State does not resume the entire franchise, which it has granted, and which has been made valuable by an expenditure of the money of the grantees, but it resumes a part of it, and to that extent lessens its value to the

grantees and their estate therein. Its effect is the same as where an interest or estate less than the whole is taken under the power of eminent domain; a less than the whole can no more be taken without compensation than the whole.

That by such acts the corporation would be "deprived" of its property within the meaning of the constitutional provision is deducible from every definition of property to be found in the books. "The third absolute right of every Englishman," says Blackstone, "is that of property, which consists in the *free use*, enjoyment and disposal of all his acquisitions, without any *control* or *diminution*, save only by the laws of the land." (1 Com. 138). "The exclusive right," says Chancellor Kent "of *using* and transferring property, follows as a natural consequence from the perception and admission of the right itself. * * * The power of *alienation* of *property* is a necessary incident to the right, and was dictated by mutual convenince and mutual wants." (2 Com. 320, 326). Property does not consist merely of ownership and possession of corporeal or incorporeal things; it includes the right to use, to control, and to dispose of. Without these rights property would be valueless; indeed, these rights are property—more so than the thing itself. Whatever act, then, on the part of the legislature would have the effect to deprive the owner of the right to use, or control, or dispose of his property, would deprive him of his property, although the possession of it be allowed to remain with him!

In the case of Wynehamer *v.* the People, (13 N. Y., 378), Mr. Justice Selden said:

"*Property is the right of any person to possess, use, enjoy and dispose of a thing.* The term, though frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it. A man may be deprived of his property in a chattel, therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his rights in regard to it *annihilates his property in it.*"

An illustration of these principles is found in the so-called prohibitory liquor laws of some of the States. The State of New York passed a law whereby it was declared unlawful to sell, except for mechanical, chemical, medicinal, and sacramental purposes, intoxicating liquors, or to keep them for sale, or with intent to sell. Intoxicating liquors were declared a public nuisance, and all legal protection was withdrawn from them. If the owner sold them he could maintain no action for the price; and if they were taken from him by force or fraud he could maintain no action for their recovery. This law was not restricted in its operation to liquors which might thereafter be manufactured or imported, but operated upon liquors already manufactured or imported at the time the law took effect. It had the effect to destroy the right to *use, control,* and *dispose of* what, by the law of the land, was property *in esse* at the time the law was passed. It had the effect to render valueless property then in the possession of the owners, upon which they had expended their labor and skill, or in which they had invested their money. The Court of Appeals declared the Act to be unconstitutional, because it deprived the owner of his property *without due process of law.* The Court, by Judge Comstock, said:

"The statute under consideration, without reference to its provisions for the seizure and physical destruction of intoxicating liquors, *by force of its prohibitions alone*, sweeps them from the commerce of the State, and thus annihilates the quality of sale, which makes them valuable to the owner. *This is destructive of the notion of property.* I need, perhaps, take no further notice of their qualified vendibility for the sacrament, and the other special uses named in the Act. These are only the occasional and incidental uses of the article. It is the general and primary *use* which is aimed at. It is the mass of property which is struck down; and the possible conservation of an extremely insignificant portion cannot change the character of the law. No ingenuous advocate of the law will deny that its great characteristic is *prohibition*, intended to turn back from the channels of commerce important masses of property, and thus, by *suppressing the use*, prevent the abuse. To regard the act in any other light, would be a fraud upon its entire policy, and upon the views and motives in which it must be supposed to have had its origin. And in order to a full view of the spirit and intent of the law, to simple prohibition we must add its penalties and its other connected and dependent clauses, the whole forming one scheme, and all tending with fatal accuracy to the destruction of property in intoxicating liquors within this State.

"Unless, therefore, the right of property in liquors is denied altogether—and this has never been done—or unless they can be distinguished from every other species of property—and this has not been attempted—the act cannot stand consistently with the Constitution. The provisions of the Constitution should receive a beneficent and liberal interpretation, where the *fundamental rights* of the citizen are concerned. But, in the case before us, its plain and obvious meaning is enough. 'No person can be deprived of his property without due process of law' by the legislature or any other power of the government. *When the law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation*, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power." (13 N. Y. 397.)

Substantially the same view has been taken by

the Supreme Court of the United States in a case which involved an exercise of the power of eminent domain. That any taking of private property for public use, which is prohibited by the constitutional restriction upon the power of eminent domain, would be a deprivation of property within the meaning of the constitutional provision in hand, no one will deny.

The case referred to was trespass on the case for overflowing six hundred and forty acres of the land of the plaintiff. The flowage was caused by a dam erected by the defendant, under, as claimed, legislative authority; and the principal question was, whether the flowage was a *taking* of private property for public use within the constitutional restriction placed upon the power of eminent domain; and, speaking to that question, the Court said:

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the *absolute conversion* of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of of our ancestors."

(Pumpelly *v.* Green Bay Company, 13 Wallace, 177.)

Authorities might be multiplied to show that the "taking" intended to be prohibited by the constitutional restriction upon the power of eminent domain, or the "depriving" intended to be inhibited by the constitutional restriction under consideration, includes acts which do not absolutely convert it, but which merely destroy the essential attributes of property, to-wit: use, control and sale; but the cases already cited are deemed sufficient. Under the rules declared in the cases cited the repeal of the charter of a private corporation would amount to an absolute conversion of all the incorporeal hereditaments of the corporation, and render useless its corporeal hereditaments; and an act reducing he maximum rates of toll would, *pro tanto* amount to a conversion of its franchise to collect and enjoy tolls; and such are my conclusions upon this branch of the principal question.

In closing this discussion, I cannot refrain from quoting a passage from Sir William Blackstone, written more than a century ago. He said:

"So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for *the general good of the whole community.* If a new road, for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public, but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. *Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal w.*"

So inestimable has this, and cognate principles of the common law, been considered by the American people, that they have caused them to be expressly incorporated into their Constitutions as *inalienable rights*—rights of which they cannot be deprived, except as a punishment for crime, by any department of the government, or by any act of their own, and it will be strange indeed if they have deliberately inserted in their Constitutions a clause which removes these safe grounds as to millions of property and leaves it exposed to the wanton assaults of legislative bodies. It will be strange indeed if they have "blown hot and cold" upon the inviolability of contracts and property—have said in one breath: "the obligation of contracts shall not be impaired," "private property shall not be taken for public use without just compensation," and "no person shall be deprived of his property without due process of law;" and in another breath have said: "the legislature may, in certain cases, impair the obligation of contracts," "private property, in certain cases, may be taken for public use without compensation," and "certain persons may be deprived of their property without due process of law." If such proves to be the case, it will be better for them to abandon their Constitutions and return to the more beneficent and consistent rules of the common law.

I am of the opinion:

1st. That a legislature can pass no law which will impair the obligations of a charter which it has granted to a private corporation, even where the constitution, or a general statute, provides that the charters of private corporations may be "altered from time to time or repealed."

2d. That a law, repealing the charter of a private corporation or reducing the maximum rates of toll therein provided for, impairs the obligation of the charter.

3d. That the only way by which a State can resume corporate franchises is to resort to the power of eminent domain, which can be exercised only upon making "just compensation."

Respectfully yours,

S. W. SANDERSON,

Counsel for the Central Pacific R. R. Co.

SUPREME COURT OF THE UNITED STATES.

1874 TERM.

CASE No. 210.

THE WINONA & ST. PETER RAILROAD COMPANY,
PLAINTIFF IN ERROR,

agst.

JOHN D. BLAKE, *et al.*, DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANTS IN ERROR.

W. P. CLOUGH,
Counsel for Def'ts in Error.

SUPREME COURT OF THE UNITED STATES.

THE WINONA AND ST. PETER R. R. Co.,
Plaintiff in Error,
against
JOHN D. BLAKE, *et al.*,
Defendants in Error.

STATEMENT OF THE CASE.

This action was originally brought by the defendants in error, in the District Court of the State of Minnesota; the object of the action being to test the constitutionality of an Act of Legislature of that State, passed March 6, 1871, entitled:

An Act to regulate the carrying of freight and passengers on all railroads in this State.

Special Laws of Minnesota, 1871, *p.* 61.

Edgerton's Railroad Laws of Minnesota, *p.* 67.

The plaintiff in error is a railroad corporation organized under special statutes of the State named, and of the late Territory of Minnesota, and has built, and is operating a public line of railroad for the conveyance of persons and property, extending from Winona, a point in that State situated on the Mississippi River, westward, across the State.

Of the several acts of Legislature whereby the plaintiff in error was created, and clothed with whatever rights and franchises it has, the first was an Act passed March 3, 1855, entitled:

A bill to incorporate the Transit Railroad Company.
Session Laws of Minnesota, 1855, *p.* 84.
Edgerton's Railroad Laws of Minnesota, *p.* 249.

Sections 1 and 2 of this act read as follows:

SECTION 1. That Charles W. Borup, Henry D. Huff, Orrin Smith, Abram H. Fridley, Lorenzo D. Smith, H. J. Hilbert, Henry H. Sibley, Andrew G. Chatfield, Leonard B. Hodges, Henry McKenty, O. M. Lord, David Olmsted, Benjamin Thompson, W. A. Jones, Orlando Stevens, George H. Sanborn, Byron Kilbron, E. D. Clinton, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be, and are hereby, made a body politic and corporate by the name and style of "THE TRANSIT RAILROAD COMPANY," and by and under that name and style shall be capable of sueing and being sued, impleading and being impleaded, defending and being defended against, in law and in equity, in any and all courts and places whatsoever, as fully as natural persons; and the said corporation may make and use a common seal, and alter and renew the same at pleasure; and by their corporate name and style shall be capable of contracting and being contracted with, and of acquiring by purchase, gift, grant, devise, or otherwise, and of holding and conveying, all such estate and property, real and personal, as may be necessary or convenient to carry into effect the objects and purposes of this act, and of the said corporation.

SEC. 2. The said corporation is hereby authorized and empowered, and it is hereby declared that the purposes thereof are, to survey, locate, construct, complete, maintain, use, and operate, and, at their pleasure, to alter the line thereof without changing the eastern terminus, a railroad with one or more tracks or lines of rails, from the village of Winona, in the county of Winona and territory of Minnesota, westwardly, by the most feasible and practicable route, to St. Paul, or some point on the Minnesota river, thence to intersect any railroad that may hereafter be constructed from Lake Superior or the Mississippi river, to or towards the Territory of Washington; together with the necessary and proper stations, depots, turnouts, en-

gines, cars, and other appurtenances and furniture of a railroad. And the said company is also authorized and empowered to extend in like manner, such railroad from its junction with the Minnesota river, to such point as they may deem proper, on the line which may be adopted and established by the Minnesota Western Railroad Company as the line of their railroad, and, also, to such point as they may deem proper on the line which may be adopted and established by the said "Lake Superior, Puget's Sound, and Pacific Railroad Company," as the line of their railroad; *provided*, the point of intersection with either of the said railroads shall not be east of the meridian of the mouth of the Blue Earth river.

Section 3 fixes the amount of capital stock; the number and size of shares; the mode by which shares may be transferred; and provides how the aggregate amount of stock may be increased.

Sections 4 and 5 grant the right of way for the road; confer power upon the Company to appropriate timber and materials for the construction and repair of the road; and provide for the condemnation of such property, necessary or convenient for the use of the Company, as may not be purchased by, or voluntarily given to it.

Section 6 fixes the time and place of the first meeting of corporators for acceptance or rejection of the rights and franchises conceded by the act.

Section 7 provides for the election of directors and officers of the corporation, and contains the following clause:

And all the affairs and business of the said company shall be conducted by or under the directions of the board of directors; and they are authorized for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things necessary to be done, and not inconsistent with the constitution and laws of the United States, or the laws of this Territory, or of this act.

Sections 8, 9, 10, 11, and 12, provide the manner in which assessments upon stockholders shall be made; limit the time for the completion of the road; authorize the company to build bridges over highways and navigable streams; prescribe the kind of rail to be used; and impose penalties for obstructing the road.

Sec. 13 reads:

Every conductor and baggage master, or agent and servant, of the said company, and who shall be engaged in the ticket office, or on the cars of said railroad, shall wear upon his hat or cap a plain badge, which shall indicate his office or station; and no conductor or collector shall demand, or be entitled to receive, any fare or toll from any freighter or passenger, or exercise any control or direction in his station, or be authorized or allowed to interfere with any passenger, baggage or freight, without wearing such badge.

Sec 14 provides that the engines of the company shall be furnished with alarm bells or whistles.

Sec. 15 reads:

This act is hereby declared to be a public act, and may be amended by any subsequent Legislative Assembly, in any manner not destroying or impairing the vested rights of said corporation.

Sec. 16, the last, provides when the act shall take effect.

4 Company

On March 3, 1857, Congress passed an act entitled:

An Act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in that State.

U. S. Stats. at Large, p. 195.

Edg. R. R. L. p. 82.

This act granted public lands to the Territory and State named in its title, to be by them respectively used in aiding the construction of certain lines of railroad in the act specified, of which the Transit Company's road was one.

Sec. 3 of this act contains the following clause:

X

And the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free from toll or charge upon the transportation of any property or troops of the United States.

Sec. 5 reads:

And be it further enacted that the United States mail shall be transported over said road and its branches, under the direction of the Post Office Department, at such price as Congress may, by law, direct; *provided*, that until such price is fixed by law, the Postmaster General shall have power to determine the same.

On May 22, 1857, the Legislature of the Territory of Minnesota passed an act entitled:

An Act to execute the trust created by an act of Congress entitled "An Act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory," &c., and granting lands to railroad companies therein named.

Ex. Sess. L. of Minn. 1857, *p.* 3, (16).

Edg. R. R. L. p. 259.

The character and purposes of this territorial statute are clearly indicated by its title. It is divided into chapters, each devoted to a distinct line of road. *Chap.* 2 is the one relating to the road of the plaintiff in error.

Sec. 1 of that chapter reads as follows:

The Transit Railroad Company is hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate, the Transit Railroad, with one or more tracks or lines, from the city of Winona, on the most direct and feasible route by way of St. Peter to the Big Sioux River, south of forty-fifth parallel of north latitude; and shall have, possess, exercise, and enjoy by the same rights, privileges, functions, franchises, authority, and immunities (with reference to the said route or any railroad to be built thereon,) and there is hereby conferred upon the Transit Railroad Company all the power and authority, contained in the charter of said company passed by the Legislative Assembly of the Territory of Minnesota, entitled "An act to incorporate the Transit Railroad Company," approved March 3d, 1855, for the purpose of carrying out the objects of this act, and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built. * *

* * * * * * * *

Sec. 2 grants to the company the lands received through the Act of Congress.

Sec. 3 treats of the location of the road and of the selection of the lands granted to aid in its construction; and provides that the road shall be a highway for the transportation of the property and troops of the United States—upon this subject using almost the very language quoted above from *Secs.* 3 and 5 of the Act of Congress.

Sec. 4 exempts the lands granted from taxation until the conveyance of the same by the company; and further provides, that, in consideration of the grants made to the company, it shall pay into the treasury of the Territory and future State, three *per centum* of its gross earnings, in lieu of taxes.

Secs. 5, 6, and 7 respectively authorize the company to transport persons and property in boats and vessels, "*and to collect and receive reasonable compensation for the same;*" and to take and hold lands, borrow money, and mortgage its property, and provide that as often as any section of the road twenty miles in length shall be finished, such fact shall be certified to the Secretary of the Interior.

Sec. 8 enjoins reciprocity in respect to transportation between the Transit Company and another railroad corporation of the territory called the Root River Valley and Southern Minnesota Railroad Company, whose road was designed to intersect that of the Transit Company.

Secs. 9 and 10, the last, respectively authorize the company to extend its line to the Missouri River, and provide when the chapter of which they form part shall take effect.

On May 11, 1858, Minnesota was admitted into the Union as a State. Her constitution then contained a special provision—added to that instrument as originally submitted to, and ratified by, the people, by way of amendment—authorizing the loan of the credit of the State to several enumerated railroad corporations, to enable them to build their respective lines of road.

The plan embodied in the constitutional provision al-

luded to was, that the State should deliver its interest bearing bonds, in certain specified quantities, to the respective companies, to be by them negotiated; and that, as security for the payment of the bonds by the companies, each should execute to the State a mortgage of all its rights, property, and franchises, including its land grant.

One of the companies to be aided in the manner stated was the Transit Company.

That company, in the year 1858, received bonds of the State to a large amount, which it negotiated; and to indemnify the State against loss on account of them, it executed to the State a mortgage of all its rights, property, and franchises, including its land grant.

The Company, in a few months after receiving the bonds, became insolvent; and, default having occurred in the condition of the mortgage to the State, the latter proceeded to foreclose the same. Under this foreclosure, the rights, property, and franchises, including the land grant, conveyed by the mortgage were, on June 23, 1860, exposed to public sale; and there being no other bidders therefor, the same were purchased by the State.

Subsequently, and on March 10, 1862, an act of Legislature was passed, entitled:

An Act to facilitate the construction of a railroad from Winona westerly by way of St. Peter.

Spec. L. of Minn., 1862, *p.* 243.

Edg. R. R. L. p. 325.

By this act the plaintiff in error was organized under its present name.

The act conferred upon certain persons therein named, to be by them, their successors and assigns, held under the name of the WINONA AND ST. PETER RAILROAD COMPANY, all the rights, property, and franchises, including the land-grant, which the State had acquired from the Transit Company under the mortgage aforesaid; *on condition*, among other things, that the new company should complete the road within a specified time.

Sec. 1, of the act last mentioned, reads as follows:

That all the rights, benefits, privileges, property, franchises, and interests of the Transit Railroad Company acquired by the State of Minnesota, by virtue of any acts, deeds, agreement, or things, by the said State or company heretofore done or suffered, or by virtue of any laws of the State or former territory of Minnesota, or by reason of the sale of said road or any part thereof by the Governor of said State, or by reason of any provision of the Constitution of said State, be, and the same are hereby, granted, transferred and continued to William Lamb, S. S. L'Hommedieu, John W. Kirk, Herman Gebhart, and H. C. Stimson, for the purpose, and on the terms and conditions, hereinafter in this act provided, free and clear of all claims or liens thereon, and free and discharged from all claims of the State of Minnesota against the same, except as hereinafter provided. And the said persons, by the name and style of the Winona and Saint Peter Railroad Company, are hereby invested with the right to enter upon, use, and enjoy, all and singular the road, property, franchises, and immunities heretofore possessed by or granted to the Transit Railroad Company, by an act approved March 3d, 1855, and by an act approved May 22d, 1857, and all other acts granting privileges to said company, and all the corporate rights and franchises of said Transit Railroad Company are hereby vested in and continued to the said William Lamb, S. S. L'Hommedieu, John W. Kirke, Herman Gebhart, and H. C. Stimson, their associates, successors, and assigns, by the name and style of the Winona & St. Peter Railroad Company.

On February 28, 1866, an act of legislature was passed, extending the time limited by the last preceding act for the completion of the road.

Sess. L. of Minn., 1866, *p.* 22.
Edg. R. R. L. 1866, *p.* 332.

This act contains a proviso in these words:

Provided, that said company shall be bound to carry freight and passengers upon reasonable terms.

Further acts extending the time for construction were passed March 4, 1869, and March 3, 1871.

Sp. L. of Minn., 1869, *p.* 233.
Sp. L. of Minn., 1871, *p.* 271.
Edg. R. R. L. pp. 333, 334.

The acts above cited and epitomized comprise all legislation relative to the plaintiff in error, which can, in any way, be material in this case.

Under such legislation the plaintiff in error had, when the act of 1871 to regulate the business of carrying persons and property by railroad was passed, built and put into operation about one hundred and fifty miles in length of its road; the right of way for which had been acquired by adverse proceedings under the provisions of the act of 1855.

The regulating act in question provides, in substance, that it shall be lawful for any railroad company or corporation doing business in the State to demand and receive for the transportation of freight and passengers over its line of railroad, payment in accordance with a schedule of rates contained in the act; and declares all railways in the State to be public highways, for the passage of persons and property upon payment of rates not greater than those named in the act. It further declares the rates named in the schedule to be the *maximum* of reasonable rates; and imposes penalties for refusal to carry persons or property at such rates.

Shortly after this act went into effect, the defendants in error, who are merchants living and trading at Rochester, Minnesota, a point upon the road of plaintiff in error fifty miles westward from its eastern terminus at Winona, bought two bales of merchandise at Chicago, which they caused to be shipped at that place for transportation to them at Rochester, by railroad and steamboat.

In the course of their passage, the goods came into the possession of the plaintiff in error at Winona; the Com-

pany having at that point received them from the next preceding carrier upon the route between Chicago and Rochester, without any other authority from the defendants in error than such as might be implied from the customs of carriers. Upon receipt of the goods, the Company paid to the preceding carrier the freight and charges upon them from Chicago to Winona, which amounted to the sum of $2.24.

The Company having thereupon carried the goods to Rochester, upon their arrival at that station the defendants in error tendered to the Company the amount of freight and charges which it had advanced, and in addition thereto, the sum of $0.57 as freight over its road, and demanded possession of the goods.

The plaintiff in error, however, demanded the sum of $1 as freight over its road, and refused to let the defendants in error have the goods until they should pay it that sum in addition to advanced freight and charges. Whereupon the defendants in error brought this action, which is in the nature of replevin, to recover possession of the property.

The facts in the case were embodied in a stipulation, upon which it was submitted to the court wherein the suit was originally brought.

In such stipulation it was conceded that the amount tendered was in accordance with the rates of freight established by the regulating act; and, waiving all other questions, it was agreed, that the defendants in error should recover judgment in the suit, if that act should be determined by the court to be valid and binding upon the company.

On consideration of the case, the court decided, as matter of law, that, under and by virtue of the legislation relative to the plaintiff in error, prior to the passage of the regulating act, it had become possessed of the *implied* right to transport passengers and freight over its road, and to make and receive *some* chargesf or such services; that this right, *though one arising by necessary implication only*, is one of the essential franchises of the company, and as

sacred as any other of its rights; that, in the absence of any provision in the charter, or other acts accepted by the company, fixing the *amount* of the charges for such services, the law, as in other like cases, fixed them at *reasonable rates;* and that the regulating act, assuming to fix the compensation for such services at specified sums, interferes with this, one of the most important of the company's "vested rights," and is therefore not binding upon the company, and is null and void as an infringement upon its constitutionally secured rights.

Judgment was accordingly rendered for the company.

The case was thereupon removed by the defendants in error into the Supreme Court of the State, by appeal; which Court, upon consideration of the case, decided that the legislation relative to the plaintiff in error, prior to the passage of the regulating act, did not embody any contract between the company and the State touching the rates of compensation which the former should have a right to exact for use of its cars and road.

The judgment of the Court below was accordingly reversed, and judgment that the defendants in error recover the property, rendered.

To reverse this judgment of the Supreme Court of the State of Minnesota, this writ of error was sued out.

The regulating act is confessed to be good, if it violates no contract between the State and the company, in force at the time of its passage.

Whether it does or not, has always formed the sole issue in the case. Of this issue, the defendants in error, of course, maintain the negative.

Their theory is, that the State and the company have not contracted touching what rates of compensation the latter may exact for the passage of persons and property over its line of road; and they base that theory upon two principal propositions, either of which they think sufficient to support it.

Those propositions are:

1st. *None of the statutes relating to the company contain a grant to it of the right to collect compensation for the use of its road and cars.*

2nd. *If such statutes can be construed to embrace a permission to the company to collect pay for the use of its road and cars, such permission is not of a character to import a promise by the State that it will not pass laws to regulate the rates of such compensation.*

STATEMENT OF SUBJECTS TO BE DISCUSSED.

The argument of the case, from the standpoint of the defendants in error, will involve the consideration of the following main topics:

I. The nature of the franchise held by the plaintiff in error, to build, maintain and operate its line of railway.

RP 24–35

II. The nature of the compensation charged by the maintainers and operators of public lines of railway for the passage of persons and property over such lines.

RP 36–42.

III. The rules by which grants of public franchises are to be construed; and whether the grant of the franchise to build, maintain and operate a public line of railway, vests in the grantee, by implication, the franchise to exact tolls for the passage of persons and property over such line.

RP 42–54

IV. The statutes relative to the plaintiff in error—whether they can be construed to embrace a grant of the franchise to levy tolls.

RP. 55–63

V. The legislative power of States—how it can be parted with over persons and things within their territory.

RP 64–73

VI. The grant of the franchises to build, maintain, and operate a public line of railway, and to take tolls thereon—whether such grant, in and of itself, imports a

promise on the part of the State not to pass laws to regulate the use of such franchises.

VII. The statutes relative to the plaintiff in error—whether they can be construed to embrace a contract not to pass laws to regulate the use of the franchises granted by them.

BRIEF OF ARGUMENT.

PRELIMINARY OBSERVATIONS.

Before proceeding to a discussion of the main topics which, as above stated, the defendants in error deem it necessary to consider, they wish to briefly touch upon a few matters introductory in their nature.

I. It may not be unimportant to remember that the plaintiff in error has the affirmative of the issue which the court must pass upon.

The burden of demonstration is with the Company and not with us. It is for the Company to show that the Constitution *forbids* the legislation which it impeaches, and not for us to show that the Constitution *permits* it.

Every presumption is in favor of the binding force of statutory laws. Courts cannot and will not hold such laws to be void, until their invalidity is made clearly apparent.

Before a court will declare an act of legislature to be invalid, a case must be presented in which there is no room for fair doubt.

Citation of authorities to prove this proposition is needless.

The Company must, therefore, be able to show conclusively, that the statute of which it complains, impairs the obligation of some contract between the State and itself, to its detriment; otherwise its case will fail.

II. The Company must also show an injury to itself flowing from this particular statute.

To show that the State of Minnesota may, some time hence, pass laws clearly impairing the Company's vested privileges, will not be enough to sustain the latter's position in this suit.

A universal and favorite line of argument with those engaged in resisting the enforcement of distasteful laws is, to urge the danger, if the particular law under consideration be held valid, of the enactment of other laws going to extreme lengths in their violation of private rights.

But such arguments are irrelevant. If it could be shown beyond a doubt, that the judgment of this court, sustaining this act, would induce the instant passage of a law utterly repealing the Company's charter, and vesting all its property in strangers, the first step would not be taken toward proving that *this* law interferes with the use of the Company's franchises in any particular.

The validity of this statute must be determined upon its own provisions. If the plaintiff in error be unprepared to demonstrate its inability to obey this very act, and still enjoy its vested rights, the Court must hold that no contract obligations with it have been impaired.

III. To arrive at true conclusions about the matter at issue will be difficult, unless it always be borne in mind what features a contract must have, in order that the regulating act can clash with it.

Among the first things to be done, therefore, in the investigation of the case, is the clear and definite ascertainment of what those features must be.

The subject matter of the act is compensation for facilities to be afforded in the future. Its legal effect is nothing more than the fixing of a boundary beyond which the operators of railways may not go in their charges for the passage of persons and property over their respective lines. The operators of railways are left by the act free to fix rates of tolls at will, provided only that such rates

be impartial, and be not greater than those named in the act itself.

One element, therefore, which must be present in a contract in order that the regulating act may be capable of interference with it, is the granting of power to demand *higher* rates of tolls than those which the act itself authorizes to be taken. This law can well stand with all contracts allowing the same, or less, rates. It confirms the former, and enlarges the latter. A grant by charter, to take tolls, is a *special* concession to the particular Company; the grant by this law to do the same thing is but a *general* concession to all operators of railways in the State. That the general concession is susceptible of interference with the special, only when the former is smaller in amount than the latter, is a proposition made manifest by its bare assertion.

If, at the passage of the regulating act, no contract subsisted between the State and the plaintiff in error, whereby the former assured to the latter the right to charge rates of tolls as great as those allowed by the act, then the act, instead of *impairing* any of the company's rights, has *enlarged* its rights.

So, if at the passage of the regulating act the plaintiff in error was invested with the privilege of charging rates of tolls merely eqnal to, but no greater than, those named in the act, then, clearly, no right has been infringed.

To illustrate:

For first-class freight between Winona and Rochester, upon the road of the plaintiff in error, the act allows $4.05 per ton. The Company is permitted by the act to charge any rate it pleases, not in excess of that rate. If the Company's charter vested it with the right to demand tolls up to that rate, but not beyond it, the Company has under the general law precisely what it before had under its charter.

The right to the compensation can be shown by the Company under its charter, or under the general laws, at

pleasure. The general law operates merely by way of confirmation of the license given by the charter.

Again, if the Company's charter did not vest it with the right to charge as much as $4.05 per ton, but, for instance, only $3.00 per ton, *maximum*, the regulating act has not only left the Company in free enjoyment of its old right to demand $3.00 per ton, but has conceded to it a new privilege to have $1.05 per ton in addition.

In either of these cases, it is clear that the Company could not be harmed by the law of which it complains.

If, however, the Company's charter vested it with the right to demand *more* than $4.05 per ton—for example, $5.00—in that case, it might truthfully say, that the regulating act, if good, has subtracted from its chartered liberties.

These illustrations show that the plaintiff in error cannot maintain its theory, in this case, by the production of a legislative contract authorizing it merely to take *some* tolls. The Company has upon its shoulders the burden of proof; and it must show everything necessary to make out, completely and positively, a diminution of its rights. It must show a contract to have actually been broken by the statute which it claims to be invalid, and it cannot show this, except by showing a contract with the State giving it leave to exact tolls at rates higher than those specified in the act itself.

A contract, too, in order that the regulating act could be capable of interfering with it, ~~must~~ would have to go to the extent of making the right of the Company to compel the payment of tolls at greater rates than those specified in the act itself *permanent* in character; of putting such right beyond regulation by the State.

The legal import of such a contract would have to be, that, in so far as the tolls forming the subject matter of the contract were concerned, all legislative authority of the State should be renounced. For, although the State may agree with the operator of a line of railway that

he may levy certain tolls upon those who pass over such lines; unless the State goes further, and *agrees not to alter* the rates of such tolls, no contract will be broken if it does alter them.

Counsel upon opposite sides of this case may differ widely as to how such a contract of non-interference with the use of franchises can arise; and as to what would be evidence of it; butthat such a contract must exist, in order that the State may be deprived of its power to legislate upon such a subject, as upon others, will hardly be denied.

For instance, counsel upon the other side may contend that *a mere grant of tolls*, without anything further, excludes the State, forever afterwards, from decreasing the rates of such tolls, although, from altered circumstances, they should become oppressive to the public, and secure to the grantee profits out of all proportion to the amount of capital invested in the undertaking. In assuming this ground, however, counsel would not thereby argue that the State ~~has~~ lost its legislative power without contract to give it up; but, on the contrary, merely would *infer* such contract from the grant.

IV. The fact that the plaintiff in error is an incorporated body, has no bearing upon the points really involved in the case. To prevent confusion, therefore, that fact should be left out of view in the consideration of the case.

No rule of law exists, constitutional or otherwise, giving to the tenure whereby bodies corporate hold their property or rights, a legal character more inviolable or sacred than that whereby individuals hold theirs.

It must be admitted, however, that the popular impression is otherwise; and that the bar, and even the bench, have not, at all times, seemed to remember this legal truth.

Little reflection is needed to perceive, that there is nothing in the nature of a corporation aggregate to give it civil rights of a character more exalted, and less subject to

regulation by government, than those which the individual members composing such corporation are capable of acquiring.

What is a corporation aggregate?

Numerous answers to this question are to be found in the books; differing, however, widely one from another.

In many of them, perhaps in the majority, the idea of an abstract, imaginary being, distinct from the company of persons forming the corporation, is made much too prominent.

The true theory is, that a corporation aggregate is nothing more than a society of individuals authorized by law to hold property and to conduct affairs of common interest in a peculiar mode.

A standard treatise upon the science and art of reasoning lays down the rule, that a true definition of a term is the sum total of all the *essential* propositions which can be framed with such term as their subject.

A System of Logic, By J. Stuart Mill, 8th Ed., p. 106, *Sec.* 1.

Admitting the correctness of this rule, an accurate definition of the term *Corporation Aggregate* would be: A company of individuals empowered for one or more specified purposes:

1. To have perpetual succession of its members, in such way that when one person ceases to be a member another may succeed to his place and rights, without a dissolution of the society being thereby wrought, as it would be in case of a mere copartnership, and without a change in the legal relations of the company to third persons being thereby produced, as it would be in case of a mere voluntary association of any character.

2. To have a common name, and by that name to sue and be sued, grant and receive, contract and be contracted with, and hold property, without need of using the names of the individual members of the society.

3. To have a common seal for the authentication of the acts of the society, separate and distinct from the seals of the individual members of the company.

4. To make by-laws or private statutes for the control of the common affairs of the society, or for the regulation of some object of public interest, which, being assented to by a certain proportion of the members—usually a majority—acquire the force of laws in respect to all the members, and, in many instances, also in respect to all persons prosecuting a particular kind of business, or being within a particular district of country.

The common law has annexed to membership of societies authorized to act in the mode specified, certain immunities, and at the same has imposed upon it certain disabilities, in regard to the common affairs and possessions.

Thus, by the common law, only that property devoted to the purposes of the society is liable for the common obligations of the whole body. And the persons and estates of the individual members are free from liability therefor; an exemption, however, which, in modern times, has often been thought incompatible with public policy, and therefore has often been to certain extents cut off by statute.

The right enjoyed by a society of persons to transact business in the manner stated, is known to the common law by the term *Franchise;* which signifies, *A Royal privilege subsisting in the hand of a subject,*

Black. Comm., vol. 2, (*marg. p.*) 37.

The very definition of the term Franchise, indicates clearly in whom the right, of which it is the name, must always be vested; that is to say, *in natural persons.*

This proposition is distinctly enunciated by the great commentator just cited. He says:

It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic; with power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom.

Black. Comm., Vol. 2, (*marg. p.*) 37.

It is impossible to conceive of franchises being vested elsewhere than in natural persons. Even in the case of the franchise to act as a body corporate—that is to say, in the manner before described—the franchise must pass directly from the sovereign power to natural persons, and can only be exercised by natural persons. It is for the reason that the franchise to act as a corporate body cannot reside elsewhere than in the natural persons composing such body, that the death of all such persons operates to utterly destroy the franchise, and to dissolve the corporation. When there ceases to be a company of natural persons, there ceases to be a corporation also.

Franchises are of many classes, and of a great diversity of legal natures. All of them, however, have their origin in the same way; that is to say, in grant by the sovereign authority to *individuals*. And, in case of all of them, when the natural persons to whom the grant is made, and their successors in interest, cease to be, the franchise dies also.

One or more franchises may be held by the same society of persons, according to the will of the sovereign, and the consent of the members of the society.

Thus, perhaps, the franchise to act as a body corporate exists alone, and unaccompanied by any other franchise, in the great majority of instances at the present period.

This is true in every instance, where the particular purpose for which the society is formed is one the prosecution of which is lawful to citizens generally, without the special and express consent of the government being first had.

Thus, it is lawful for all subjects of a government to be charitable. No special and express consent of the ruling authority is needed to permit the bestowal of alms. The right, therefore, to devote property or personal service to the relief of the unfortunate, is not a franchise. If a company of individuals desire to found and maintain a hospital or school, they are free to do so without asking the State. If, however, for the greater efficiency of the project they

purpose undertaking, they wish to manage their common affairs in the mode described in the definition above suggested, they must get the special and express permission of the State; in other words, they must acquire the *franchise*, to act in that way. If they do acquire such franchise, it is merely one to act as a body corporate. But, whether the scheme be conducted with the franchise or without it, the undertaking is that of all the persons making up the company; and the property devoted to the scheme is their property.

So, it is lawful for all citizens of a State, in absence of express prohibition, to trade in merchandise, or to insure the property of others against loss by fire, without the special leave of the government to do so.

The right, therefore, to trade in merchandise, or to insure the property of others, is not a franchise.

Any association of persons may, if it sees fit to do so, carry on either business, without being incorporated for that purpose.

If, however, such persons desire to be clothed with the facilities and immunities arising out of the transaction of business in the mode described, they must have the express and special authority of the soverign power to that end. They must have the franchise to deal as a body corporate.

If men become incorporated to carry on the business of trade or insurance, the only franchise they hold is that to be an incorporation, that is to say, to manage their affairs pertaining to the particular business in a peculiar mode. The charters of such companies do not invest the persons therein named as grantees with the right to carry on the particular business, or to hold property therefor—for they have those rights already, in common with other citizens—but only to carry on the business and to hold the property in a particular mode.

But the issuing of notes designed to circulate as money, or the erection and operation of a public ferry, are things belonging to government. No citizen, and consequently no combination of citizens, can

do either of them without first being specially and expressly empowered thereto by the sovereign authority of the country. The right, therefore, to issue notes to circulate as money, and the right to erect and operate a public ferry, are each a franchise.

Neither of these franchises can be created otherwise than by the grant of the right to do the thing to one or more natural persons. If it be the sole franchise granted, the grantees—if there be more than one—must manage and use it as a mere voluntary association of individuals, subject to the inconveniences and liabilities that the law attaches to that method of business management. But, in the greater number of cases, the grant of the franchise to issue currency, or to set up and operate a public ferry, when made to a number of persons jointly, is accompanied with the auxiliary franchise to use and manage the principal franchise and the business and property of the grantees appertaining thereto as a body corporate.

If the single franchise to set up a public ferry be granted to ten men jointly, and to their successors and assigns, it will be too clear for argument that the franchise will reside in those persons, and not elsewhere. If so, why does not the same result follow, when the grant of the right to erect the ferry is attended by the grant of the auxiliary right to do so as a corporation?

The latter franchise does not add to, nor subtract from, nor in any manner modify, the legal qualities of the former, nor affect the title to it, nor vest it in an owner different from the one in whom it would vest if granted alone.

The grant of the franchise to act in the particular undertaking as a corporation, has no bearing whatever upon the *ownership* of the franchise to set up the ferry; but relates purely to the *method* in which its owners are to *manage* and *use* the latter franchise.

Any theory, therefore, which treats the rights and franchises of a corporation aggregate as being something other

than the rights and franchises of the persons composing such corporations, must be regarded inaccurate.

Railway charters usually—in America at least—grant four distinct franchises.

1. That to construct, maintain, and operate a public line of railway.

2. That to demand and receive tolls for the passage of persons and property over such lines.

3. That to condemn lands and materials for use in the construction, maintenance, and operation of such lines.

4. That to carry on the undertaking as a body corporate.

The *firstly* enumerated of these franchises can well exist without the co-existence of either of the other three: and the *secondly* enumerated without that of the *thirdly* or *fourthly* enumerated.

The *secondly* enumerated of these franchises is the subject of the controversy in this suit. If the society of persons forming the party plaintiff in error have that franchise, it necessarily is vested in the members composing that society. And that fact is in no way modified by the further fact that the same society is invested with the additional franchise *fourthly* enumerated.

If any rights of the Winona and St Peter Railroad Company have been impaired by the legislation of Minnesota, they are the rights of those persons named in that Company's charter as the grantees therein, and of such other persons, if any, as may have succeeded to their interests.

In considering the case, therefore, it should be constantly remembered, that the position of the plaintiff in error in regard to the matters therein involved is in no degree strengthened because the society of persons forming that party are endowed with the corporate faculty; and that the rights of the plaintiff in error in respect to toll for passage

upon its line of road are no higher or more sacred, than if they belonged to a single unincorporated person.

The right to levy tolls for passage upon a public way, can arise only through grant by the State: and whether such grant be made to one man or to many, and whether or not it be attended with the concession of the further franchise to act as a body corporate, cannot vary the extent of the protection afforded to it by the State or the Federal, Constitution.

The several main topics hereinbefore specified will now be taken up and discussed in their numerical order.

I.

The Nature of the Franchise held by the Plaintiff in Error to Build, Maintain, and Operate its Line of Railway.

The furnishing of the means of communication between different localities of a State is a *prerogative right;* that is to say, one vested primarily in the sovereign power of the State.

1 *Red. on Rys., p.* 81, *s.* 25.

No mere subject or citizen can establish a road, bridge, ferry, canal, or railroad, without the express leave of the ruling authority of the country in which it is to be done.

Payne vs. Pardridge, 1 *Salkeld*, 12.

Mills vs. St. Clair, 8 *How.* 681.

Black. Comm., vol. 2, (*marg. p.*) 38.

In the case of *Talcott vs. Pine Grove*, afterward removed by writ of error into this Court, the Circuit Judge in giving the opinion of the Court below, forcibly remarked:

For all time, the setting up of a highway or ferry for the carrying of persons and property has been deemed, in the common law, a *franchise;* a matter of governmental concern; a part of the subjects in the immediate possession

of the political power, and the exercise of which demanded a release of this right, by the sovereign, by special grant or charter.

Bench and Bar, 1872, *Jan. No.*, *p.* 67.

The leading work upon public law extant puts the provision of the means of travel and intercommunication between the different parts of a country, among the chief ends which civil government is created to subserve.

Vattel, *Law of Nations*, (*marg. p.*) 43.

The power and duty to furnish highways is vested in governments, because the existence of such ways is essential to public well-being; and to entrust their provision to private enterprise would be unsafe. The danger of so doing would lie not alone in the total inadequacy of private resources, but also, and probably in a greater degree, in the power of individuals to capriciously interfere with the transit from place to place of persons and property, which public interest requires to remain as little hampered as possible. If the means of travel and transportation were to be left in private hands, as the ordinary enterprises of industry and commerce are, the public demand for them might remain unsupplied altogether; or, if supplied, it might be only on such terms as cupidity or malice should see fit to extort.

The prerogative of furnishing public ways is one that States rest under obligation to exercise to the full extent which the interests of their people demand, and their resources reasonably justify. States are under duty to foster the interests of their citizens by the provision of all needed lines of transit, as much as to protect the persons and property of their citizens by the maintenance of courts of justice, and of prisons for the punishment of public offenders.

Nor is the duty of States confined to any particular *modes* of communication. Obligation to furnish any must necessarily amount to obligation to furnish the best that a prudent regard for their resources, the wants of their people,

and the configuration of their territories will permit. The duty is to keep pace in these things with the march of invention; to provide railways and canals, as well as ferries, bridges, and common roads.

But how must States perform these duties?

The people composing them cannot act in a body for any purpose.

States can perform their functions only by the hands of agents. A few people must be selected, and clothed with power to act for the whole. States must build and maintain their channels of internal commerce in the same mode as that by which they hold their courts, administer their laws, and collect their revenues; that is to say, by *agents*. Such agents, too, must be *persons*. They may be public officials, or private individuals, or societies of persons acting as bodies corporate.

States, for the purposes in question, avail themselves of the services of agents of all these classes. The duty of providing common roads and bridges is mostly, throughout Great Britain and America, entrusted to municipal corporations, to-wit, to counties, cities, and townships.

In comparatively rare instances, private individuals are the selected instruments, as in case of ferries; while for the construction of improvements of great magnitude, requiring the constant exercise of skill and attention for their successful management, such as railways and canals, societies of persons, acting as bodies corporate for the special purpose, are almost uniformly employed.

There is nothing, however, in the nature of the duties to be performed to prevent their performance exclusively by either one of the classes of agencies named. Private individuals can as well be clothed with authority to build and operate railways and canals, as can societies of persons acting in a corporate capacity.

What, then, is the character of the right to furnish a public railway, when that right is delegated to, and held and

exercised by, persons not officials, nor invested with municipal powers?

The answer to this query becomes obvious, when it is remembered that the provision of public lines of transit is not merely a thing belonging to government, but is one of its chief functions, and futhermore that States must exercise this prerogative, like all others, by means of selected instruments.

To build and maintain a public line of railway is always an operation of government. Those who are entrusted with the prosecution of such works are, to that extent, engaged in the exercise of public functions. The legal quality of the right to build and maintain a public railway cannot be in any manner affected by the character of the agency selected by the State for the exercise of that right. It must be the same thing in law, whether the government chooses to confer the trust upon public officers, or upon other persons whom it may deem more capable, financially and personally, of performing it.

Railways built for the convenience of the public generally, or (which is the same thing in law) of all who may see fit to avail themselves of the facilities afforded by them, bear a uniform legal character.

They are all public highways, whether the funds that built them have ever passed through State coffers or not.

They are not objects in which the public derive rights merely because their promotors offer their facilities to all who may apply; as in case of public inns, and the like. They are institutions the very creation and maintenance of which are but the use of a faculty of government.

And the right the public has to enjoy them, can well be derived from the share which each citizen of a State may be supposed to own in all the faculties of such State.

Proof of the correctness of these views is to be found in railway charters generally, in all countries; and in the nature of a common means used by governments for the promotion of railway enterprises. The grant of the *Power*

of Eminent Domain to the builders and operators of railroads, and the exercise of the *Power of Taxation* to aid in their construction, are referred to.

The power of eminent domain is one that can only be used to accomplish some governmental purpose. That clause in our Federal and State Constitutions that prohibits the taking of private property for "public use," without just compensation, has almost uniformly been construed to forbid its being taken for any other kind of use, even upon payment of full compensation. The meaning of the term "public use" in the particular connection, is broader than that of the terms "*public convenience*" or "*public advantage.*" The word *public* cannot be regarded as being there used in its popular sense; but must be construed to signify the *Commonwealth*, the *State*. The use must be a State use. It must be one for some purpose connected with the administration of public affairs by the sovereign authority.

It is not enough to authorize the employment of this power that the people generally of any particular district of territory, or even throughout the State, will derive benefit from the enterprise to be aided. The public may be truthfully said to derive both benefit and convenience from every useful private enterprise.

A well conducted commercial business is clearly an advantage to the entire community in which it is carried on. Its benefits may be greater and more general than those flowing from most public roads of the neighborhood. It may even be the chief source of prosperity to the inhabitants in its vicinity. Yet, the conduct of such a business upon any premises would not constitute a public use of them; and no one would argue that the power of eminent domain could be invoked to obtain grounds upon which to erect a commercial establishment.

The case of *Public Inns* affords a stronger example. Such places are not only for general public *convenience*, but the public have rights in them, well defined and important, and for disturbance of which action will lie. Yet the power of eminent domain cannot be resorted to for the taking of

land on which to build a public inn. And the only reason why it cannot be, is because the entertainment of the public, with food and lodging, is not one of those things embraced in the functions of States.

The power of taxation, likewise, is one that can only be used for strictly State purposes. If the power of eminent domain, that always pays for what it takes, that never does more than to convert property from one form into another equally valuable, can be used only to accomplish governmental ends, how much clearer must it be that the power of taxation, which takes without payment, must be confined in its exercise strictly to like purposes?

And the use of these two great governmental faculties does not confer a public character upon what, without their use, would remain of a private nature. Their use is only *evidence* going to show the true legal character of the thing in behalf of which they are exerted.

As the powers of taxation and eminent domain are both exercised in all States of the Union, to promote the building of public lines of railroad by companies of private persons specially authorized to do so, it must be taken as the judgment of the universal American public, that the building of such lines is always an undertaking governmental in character.

Beekman vs. Sar. & Sch. R. R. Co., 3 *Paige*, 45.
Bloodgood vs. M. & H. River R. R. Co., 18 *Wend.*, 2.
Davidson vs. Ramsey Co., 18 *Minn.*, 482.
Sharpless vs. The Mayor, 21 *Penn. St.*, 147.
Pine Grove vs. Talcott, 19 *Wall.*, 666.

In the case last cited, this court used the following language:

Though the corporation was private, its work was public, as much so as if it were to be constructed by the State. Private property can be taken for a public purpose only, and not for private gain or benefit. Upon no other ground than that the purpose is public, can the exercise of the power of eminent domain in behalf of such corporations be supported.

But, while the views above set forth may be conceded to be truthful in so far as the *way* itself is concerned, attempt may be made by the plaintiff in error to distinguish between the business of *maintaining the way*, and the business of *operating* it, by the periodical running of trains over it for the carriage of freight and passengers. As to the business of operating the road, it may be said, that it is merely the ordinary business of *Common Carrier;* that it does not involve the use of any *sovereign* or *governmental* function; and that its legal qualities are in no way different from those of carrying by wagon over the ordinary roads of the country.

Of course, the legal character of the business of operating a public railroad, provided by the operators, may be made to vary by the legislative will, between limits considerably apart.

The provisions of the particular charter must, therefore, be mainly relied on to determine such legal character in any given case.

The Legislature, no doubt, may, if it see fit, entirely separate the business of maintaining the way from that of the running of trains over it; and may place the two enterprises in distinct hands. But it has not done so in this case. More than that, it has not even separated the one from the other in its treatment of them in this Company's charter. It has said nothing in that instrument to indicate an understanding that the maintenance of the road, and its operation with trains of cars, were not to constitute a single undertaking.

All the essential powers of the Company were conferred by the original act of incorporation.

L. of Minn., 1855, *p.* 84.

Edg. R. R. L., *p.* 249.

And its powers to build and operate its road were substantially all granted by *Sec.* 2 of that act. That section, in general terms, merely authorizes the Company to build, maintain, *use*, and *operate*, a line of railroad, commencing at a designated point, and extending in a designated

general course, *together with all necessary depots, stations, engines, cars, and appurtenances of a railroad.*

None of the acts relating to the Company contemplate that others beside the Company should be at liberty to run trains over the road. The intention of the State may be fairly considered to have been, that the right to operate the road should rest exclusively with those empowered to build and repair it. The public were not to be allowed to use the road with their own engines and cars, even should it be practicable for them to do so.

The rights of the public were not to be in the *way* considered by itself, but only in the *trains* which the Company should run over it.

Under such a grant of power, there would be great difficulty in seeing why the providing of the road, and its operation with trains of cars, do not comprise a single franchise, a single complete scheme for furnishing the public with an improved highway over a particular route. The highway contemplated by this charter, clearly was not to consist merely of a graduated road bed, supporting a track of iron rails; but the way so made was to be furnished with proper trains of cars, without which the road itself, as a means of passage, would be utterly useless, and therefore utterly worthless.

In the early history of railway construction, a railway was a very different thing from what it has since become. All its appointments were comparatively rude and inefficient. During the first years, animals afforded the only power for the propulsion of vehicles. Even after the invention of the locomotive engine, that machine remained for a long time so imperfect in its mode of construction, and in its capabilities, as to be not very greatly superior, as a furnisher of tractive force, to the beasts which it superseded. During those periods of railway history, the vehicles used upon such roads were necessarily small and inexpensive, and rates of speed were extremely low. For these reasons, persons wishing to use such roads could furnish their own vehicles and motive power with little outlay of capital;

But, while the views above set forth may be conceded to be truthful in so far as the *way* itself is concerned, attempt may be made by the plaintiff in error to distinguish between the business of *maintaining the way*, and the business of *operating* it, by the periodical running of trains over it for the carriage of freight and passengers. As to the business of operating the road, it may be said, that it is merely the ordinary business of *Common Carrier;* that it does not involve the use of any *sovereign* or *governmental* function; and that its legal qualities are in no way different from those of carrying by wagon over the ordinary roads of the country.

Of course, the legal character of the business of operating a public railroad, provided by the operators, may be made to vary by the legislative will, between limits considerably apart.

The provisions of the particular charter must, therefore, be mainly relied on to determine such legal character in any given case.

The Legislature, no doubt, may, if it see fit, entirely separate the business of maintaining the way from that of the running of trains over it; and may place the two enterprises in distinct hands. But it has not done so in this case. More than that, it has not even separated the one from the other in its treatment of them in this Company's charter. It has said nothing in that instrument to indicate an understanding that the maintenance of the road, and its operation with trains of cars, were not to constitute a single undertaking.

All the essential powers of the Company were conferred by the original act of incorporation.

L. of Minn., 1855, *p.* 84.

Edg. R. R. L., *p.* 249.

And its powers to build and operate its road were substantially all granted by *Sec.* 2 of that act. That section, in general terms, merely authorizes the Company to build, maintain, *use*, and *operate*, a line of railroad, commencing at a designated point, and extending in a designated

general course, *together with all necessary depots, stations, engines, cars, and appurtenances of a railroad.*

None of the acts relating to the Company contemplate that others beside the Company should be at liberty to run trains over the road. The intention of the State may be fairly considered to have been, that the right to operate the road should rest exclusively with those empowered to build and repair it. The public were not to be allowed to use the road with their own engines and cars, even should it be practicable for them to do so.

The rights of the public were not to be in the *way* considered by itself, but only in the *trains* which the Company should run over it.

Under such a grant of power, there would be great difficulty in seeing why the providing of the road, and its operation with trains of cars, do not comprise a single franchise, a single complete scheme for furnishing the public with an improved highway over a particular route. The highway contemplated by this charter, clearly was not to consist merely of a graduated road bed, supporting a track of iron rails; but the way so made was to be furnished with proper trains of cars, without which the road itself, as a means of passage, would be utterly useless, and therefore utterly worthless.

In the early history of railway construction, a railway was a very different thing from what it has since become. All its appointments were comparatively rude and inefficient. During the first years, animals afforded the only power for the propulsion of vehicles. Even after the invention of the locomotive engine, that machine remained for a long time so imperfect in its mode of construction, and in its capabilities, as to be not very greatly superior, as a furnisher of tractive force, to the beasts which it superseded. During those periods of railway history, the vehicles used upon such roads were necessarily small and inexpensive, and rates of speed were extremely low. For these reasons, persons wishing to use such roads could furnish their own vehicles and motive power with little outlay of capital;

and could themselves conduct their trains over the roads without danger of accident.

In those days, therefore, railroads were regarded as constituting completed public highways when the way itself had been constructed. The public was expected to, and in most cases did, provide their own power and vehicles.

But the wonderful improvements that have since been wrought in the construction and equipment of railroads have done away with all those things.

The great expense of motive power and vehicles of modern style, and the high rates of speed now in vogue, practically forbid the public either to provide their own vehicles, or, having them, to conduct them over the roads. For the past twenty years or more, it has been essential that the operation of a line of railway should be prosecuted under a single management, for mere purposes of safety; while the great aggregation of capital required to equip and operate such a line, has put that sort of enterprise far beyond the capabilities of individual resources.

A modern line of railway, therefore, does not begin to be of use to the public until it has been put into operation with trains of cars; and, therefore, until that is done, it cannot with any accuracy be called a public highway. The road alone, at the present day, if unsupplied with trains making regular journeys over it, would not be a highway for use by the public with carriages of peculiar construction; but would be something which the public could not use at all. It would not be a thoroughfare for the public, for any purpose.

The Legislature of Minnesota acted in view of these facts, when it granted the charter for this road; and that is why careful provision was made for the perfection of the road as a public way, available to the public for passage, by authorizing, and thereby requiring, the Company to properly equip the road with the necessary engines and cars, and to use and operate it by the periodical running over it of all necessary trains.

It may be deemed a general legal truth, that where a party assumes to provide a public highway of such a nature that vehicles of special construction must be used upon it in order to render it available as a means of public transit; and the same party is also exclusively authorized to operate the way with the necessary vehicles; in such case the operation of the way, and its maintenance, are to be regarded as inseparable parts of one single franchise, and not as two distinct matters.

From the nature of things, this principle has not, in the past, been able to present a large variety of illustrations; for the kinds of public ways so far devised, have been extremely few in number. But in the case of *Ferries*, we have a common, and at the same time convincing example of it.

Ferries have never been asserted in the books to be anything else than highways. They have uniformly been accorded the same legal nature as *Bridges* or *Turnpike Roads*. No one can set up a public ferry any more than he can establish a public bridge, without express leave of the State first had and obtained; for the maintenance of a public ferry involves the exercise of governmental functions to no less an extent than does the maintenance of a public railway. Note to Blissell vs. Hart, Willes.

Charles Riv. Bridge vs. Warren Bridge, 11 *Pet.*, 420 (*per Story, J., p.* 622.)

Mills vs. St. Clair, 8 *How.*, 581.

McRoberts vs. Washburn, 10 *Minn.*, 23.

Yet, in the maintenance of a ferry, how little beside transportation from place to place is involved?

It is said in the books that the ferry is in respect to the landing place, and not in respect to the water; but a ferry without boats plying from shore to shore would be as little a public highway, as would a railroad without trains of cars running over it.

In the case of ferries, nobody has yet suggested that the franchise is divisible in law into two parts; to-wit, the furnishing of the landing places, and the operation of the

ferry by the running of boats to and fro between them. No one has yet contended, that the maintenance of the landing places is one thing, and the running of boats another; but courts and lawyers have thus far looked upon the two as forming inseparable parts of one single franchise, to furnish a highway between two designated and fixed points.

What fair ground of distinction can be pointed out, between the legal nature of the franchise to maintain and operate a public ferry, and that to maintain and operate a public railroad? If the former be a single, indivisible thing, why must not the latter be also? If the operation of the ferry with boats, be not a separate franchise from the provision of the landing places, why can the operation of the railroad with trains of cars be one distinct from that of providing the way on which the cars are to run?

The landing places without the boats would be no more useful to the public in the one case than the mere road bed and track without the trains would be in the other.

Another convincing test that the builders of public railways in operating their lines of road are prosecuting a business of a higher legal nature than that of common carrier, is to be found in the obligation resting upon such parties to continue in the prosecution of the undertaking, so long as their franchise to do so remains in force. If they attempt to discontinue either the maintenance or the operation of the road, *Mandamus* at the suit of the government lies to enforce the performance of their duty in the premises.

Winch vs. Birkenhead Ry. Co., 13 *Eng. Law and Equity Rep.*, 506.

Queen vs. Trustees of Luton Roads, 1 *Q. B.* 860.

Cohen vs. Wilkenson, 1 *McN. & Gor.*, 481.

State vs. Hart. & N. H. R. R. Co., 29 *Conn.*, 538.

People vs. Albany & Ver. R. R. Co., 24 *N. Y.*, 261.

If, in operating their roads, such parties were merely engaged in the business of common carrier, the result would be different. They might withdraw from the business of sending trains over their roads, at pleasure, provided the suspension should be permanent and general. A mere common carrier, while he plys that calling, must transport the persons and property of all applicants whom he can accommodate; but he does not rest under the slightest obligation to the public to continue in the business a moment longer than he wishes. He may withdraw from a particular route, or from all, at his pleasure, and no one can be heard to complain. And, if the common carrier be a society of individuals, acting as a body corporate, the rule is the same. The obligations to the public are no different because the carrier is an incorporated company.

The Express Companies are an example. These are all corporations; and, beside, the prosecution of their business is of immense convenience and value to the country. Yet, they can wholly withdraw from any route whenever they may see fit to do so, without asking leave of the public, or of the government which represents it. And the reason is, because to ply the vocation of mere common carrier is not a franchise.

If, when a party is empowered to build and operate a public line of railway, he could say, As to the operation of the road, I am but a common carrier, why should he be under duty to continue the running of trains any longer than he should elect to do so? He certainly would not.

II.

The Nature of the Compensation Charged by the Maintainers and Operators of Public Lines of Railroad for the Passage of Persons and Property over such Lines.

Since the right of the plaintiff in error to demand from the public using the facilities afforded by its highway, payment for such use, is of the very gist of the controversy, it will be important to definitely ascertain the legal nature of such right, in case it exists.

The fees exacted from the public, for the passage of their persons or property over a public way of any character, have, since the earliest periods of the common law, been termed in that law Tolls.

Webster's Dictionary defines Toll to be:

> A *tax* paid for some liberty or privilege; particularly for the privilege of passing over a bridge, or on a highway; or for that of vending goods in a fair, market, or the like.

The same work gives the following terms as synonymous with Toll:—*Tax*, *Custom*, *Duty*, *Impost*.

In a legal work of great authority, it is stated that the primary meaning of the word Toll is, A sum of money paid by the buyer upon goods exported or imported, or sold within the realm.

Comyns's Digest, 457.

At the same place in the same work it also is laid down that, *Toll Thorough* is a sum demanded for passage through a highway, or over a ferry, bridge, and the like.

A Toll, then, is a *tax*.

Its origin is obvious. Taxes are enforced contributions of money or property made by subjects to their Sovereign, toward the latter's means of executing his public functions.

Taxation has various forms. It may be in respect to property; in respect to persons; in respect to the exercise of particular callings; or in respect to individual benefits derived from performance of public duties, not shared in by the public at large.

Of the first class, are ordinary taxes upon real and personal estate; of the second class, poll or capitation taxes; of the third class, occupation taxes and licenses; of the fourth class, fees paid to officers, and fees paid for the use of public works.

If the State sets up a highway of any character, it may tax the general public for its support by any one or more of the first three modes; or it may tax only the individuals who pass over it, in specific sums; since they directly reap the benefit of the improvement, and are taxed in exact proportion to the extent of its enjoyments.

This last variety, the specific, individual tax is the toll.

As the State may delegate the power of maintaining any particular highway to a private person, or to an association of private persons, so it may, and commonly does, likewise delegate to the same person or association the power to tax those using the way, for such use.

The thing exacted, however, never loses its original character. It always remains a *tax*, whoever may levy it, or into whosever purse it may go.

In a late leading case upon the subject of the power of taxation, and of the forms under which that power may be exercised, it was remarked:

Tolls are delegated Taxation; and this taxation is charged and apportioned upon those only who derive a benefit from the original expenditure, and in proportion to that benefit.

People vs. Mayor of Broklyn, 4 *N. Y.*, 417, (431), *per Ruggles, J.*

But, it may be argued, that the fees which Railroad Companies can demand for the transportation of property or persons are not *Tolls* in the legal sense of that term. In other words, that because the Company owns the cars in which, as well as the road over which, the journey is made, therefore, such fees lose their nature of taxation.

That position could only rest upon the hypothesis, that the equivalent received for the money paid consisted of

mere *services*, as contradistinguished from *use of a public way*.

The argument, therefore, could only be sound to its full extent, or even in the main, in those cases, if any such exist, where the transporter by railroad of the property should, in such transportation, assume no higher legal status than that of mere common carrier, and use no power or authority which anybody plying that vocation would not be at liberty to use.

Under any form of charter, where the same party both maintains and operates the way, the chief powers necessarily employed by him in the business of transportation, partake of a sovereign character. Not a train of cars, nor a pound of freight can be moved over such a railroad without the direct and constant use of the franchise to maintain a public way. The instant the function of supplying the way becomes suspended, that instant the power to carry upon it has to terminate also.

Moreover, the fees collected for transportation in such cases form the chief, and commonly the sole, source of revenue for the repair of the road, and for repayment of the cost of its original construction. Each fee so charged, must be made up largely of that sum supposed to be the value of the use of the roadway itself, for the passage of the particular property or person carried; and to the extent of such sum, if to no further, all such fees must be deemed to be tolls.

In any instance, therefore, where the same party both owns and operates a line of railway, the fees charged by him for transportation must *include* Tolls, if they cannot be regarded as *being* Tolls and nothing more. Such fees may, in many cases, possibly embrace other items beside Tolls; but Tolls they must include, because the use of the way is the principal thing on account of which the charge is made.

And it does not matter what term the operator of the road may apply to such fees. He may call them Tolls or

Freights at pleasure; he may resolve them into the several items supposed to make them up, or charge them in single gross sums; yet, so long as any part of such fees are charged on account of the construction and maintenance of the way, so long they must be, to that degree, regarded as Tolls.

But, whatever the legal nature of such fees may be with particular railway companies, or even with such concerns usually, the fees which the plaintiff in error can collect, (if any,) for the passage of persons and property over its line, can have no other character than that of Tolls, pure and simple.

As before remarked, the plaintiff in error is merely empowered in general terms to build, maintain, and operate a certain line of railroad; and the public are without rights upon such road, except in the trains of the Company itself.

The plaintiff in error, therefore, is not empowered to transact the business of *common carrier*, as that term is understood in the common law; nor to render any *mere services*, except in so far as the same may be necessarily involved in the provision of a *public way*, capable of use by the public. This Company is only empowered to furnish a *highway;* and any fees paid to it would, therefore, be for no other consideration than liberty to pass over a highway; and consequently nothing beside Tolls.

But it may be said that even in the case of this Company, it is responsible for the safe delivery of all property entrusted to it for transportation; that for such risk it is entitled to compensation; and that, therefore, the fees it may rightfully demand from the public (if any) for the facilities afforded by its works, must, in part, at least, consist of something else than tolls.

But such reasoning would be fallacious. It is true the law has annexed to the use of the franchise held by this Company, the obligation that all property in course of transit over its highway shall be secure from injury, save

through fault of the owner, the act of God, or the act of the public enemy. This obligation, however, merely relates to the degree of care and attentiveness with which the Company is bound to use those prerogative functions which the State has delegated to it for exercise.

All public powers held for administration by individuals, whether they be State officials or others, must be used with diligence of greater or less degree—the degree depending in part upon the nature of the power, and in part upon the circumstances of the individual case calling for its exercise.

For example, the powers held and administered by sheriffs, in virtue of their office, are all governmental in quality; and in the use of them the law imposes a large degree of care; for the omission of which, the burden of any resulting loss must fall on the officer.

When the particular power delegated is one to provide a highway of such character that the property of those using it is placed for the purpose of transit in the immediate custody of him who administers the power, from public policy the degree of diligence annexed to the use of the power is greater than that annexed to the use of the power to execute the process of courts; but the difference between the two cases is merely one of *degree*, and not at all one of *principle*.

But, because the holder of a public power must exercise care in its use, the nature of the fees (if any) which he may collect for such use, is not different from what it would be if the obligation of diligence should be less, or nothing at all. A fee collected for the exercise of any public power, whether that to execute the process of courts, or that to maintain and operate a public line of railway, must be homogeneous and indivisible in its legal nature, unless the law in the particular case expressly provides to the contrary. If any part of such fee bears the legal character of a tax, the whole must do so, unless the Legislature has positively ordained otherwise. If part of a

fee conceded by the law to the holder of a franchise to provide a public way is toll, the whole must be toll, unless the same law has expressly made part something else.

The case of *Ferries* becomes again, in this connection, an authority completely in point. As a ferry has never been deemed anything other than a public highway, although involving little else than the carriage of persons and property from place to place; so the fees charged by ferrymen have uniformly been termed *tolls*.

Gunning on the Law of Tolls, 2.

The nature, in law, of such fees has not been thought to differ in any particular from those paid for the right to travel in one's own vehicle upon a turnpike road, or over a bridge.

Moreover, ferrymen are under like responsibility touching the security of property transported by them as common carriers are. The obligation of a ferryman in this regard is no different from that of the operator of a public railway, or that of the proprietor of an ordinary line of stage coaches.

Indeed, so identical are the duties of ferrymen in respect to property passing over their lines, with that of common carriers in respect to property entrusted to them for carriage, that ferrymen are often termed in the books common carriers.

Angel on the Law of Carriers, *Sec.* 82.

However, in so designating them, it is not meant that the business of maintaining and operating a ferry is not strictly the exercise of a public franchise; but only that in the exercise of that franchise the same degree of diligence must be observed, which the law annexes to the business of common carrier.

What is there, either in the nature of the franchise used; or in that of the facilities afforded; or in that of the risks and obligations incurred; to make a distinction between the legal character of the fees (if any) that the plaintiff in error could lawfully collect for passage over its

highway and the fees which a ferryman could lawfully collect for passage over his? Nothing, whatever. The two cases coincide at all points. If the fees that a ferryman could demand in respect to property transported upon his ferry ~~are~~ *would be tolls*, those which the plaintiff in error could demand (if any) in respect to property transported over its road would be *tolls* also. If the one would be delegated taxation, the other would be delegated taxation likewise.

For the reasons set forth, if the plaintiff in error is authorized by its charter to exact from the public using its works payment for such use, that authority must, as in case of all tolls levied for passage over public ways, be regarded as nothing more than a branch of the State's power of taxation committed to the plaintiff in error for exercise.

III.

THE RULES BY WHICH GRANTS OF PUBLIC FRANCHISES ARE TO BE CONSTRUED; AND WHETHER THE GRANT OF THE FRANCHISE TO BUILD, MAINTAIN, AND OPERATE A PUBLIC LINE OF RAILWAY VESTS IN THE GRANTEE, BY IMPLICATION, THE FRANCHISE TO EXACT TOLLS FOR THE PASSAGE OF PERSONS AND PROPERTY OVER SUCH LINE.

The Common Law has always maintained two contrary rules for the interpretation of public and private grants.

By that law, the grant of a private person to a private person should be rendered most strongly against the grantor; and many things not specified should be deemed to pass by necessary implication.

On the other hand, by that law, the grant of the State to a private person should be construed most strongly against the grantee; and nothing should be deemed to pass which is not expressly mentioned.

Blackstone contrasts the two rules thus:

A subject's grant shall be construed to include many things, beside what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted: and if a feoffment of land was made by a lord to his villein, this operated as a manumission; for he was otherwise unable to hold it. *But the King's grant shall not inure to any other intent than that which is precisely expressed in the grant.* As, if he grants land to an alien, it operates nothing; for such a grant shall not also enure to make him a denizen, that he may be capable of taking by the grant.

Black. Comm., Vol. 2, (*marg. p.*) 347.

The force of the commentator's illustration last quoted will not be appreciated, unless it be remembered that, by the English constitution, the power to confer denizenship upon an alien has always been a prerogative of the crown, exercisable by grant according to its free will.

The idea the author uses the example to convey is, that in grants by the sovereign to private persons, implications of all degrees must be excluded; that the grant must fail utterly, and all its purposes be defeated, rather than that any right should pass by mere intendment.

Blackstone lays down the rule as applicable to all concessions by the State to individuals. It governs even in grants of mere physical property such as lands and goods. But, from the nature of the thing, it must apply with superlative force to grants of public powers to private persons —in other words, to grants of public franchises.

The grant in question in this case is of the character last mentioned—that of the franchise to levy tolls.

It will only be pertinent, therefore, to here discuss the effect of the rule in so far as grants of that franchise are concerned.

An examination of the leading cases in point, both English and American, shows the workings of the rule, when

applied to grants by the State, passing or supposed to pass, the franchise in question, to be these:

1. The grant of the franchise to erect and maintain a public establishment of any description—whether it be a Public Wharf; a Public Market; or a work in the nature of a Public Highway—does not carry with it power to demand fees from the public on account of its enjoyment of the facilities afforded by such establishment.

2. When the establishment authorized to be erected and maintained is in the nature of a Public Highway, power to demand compensation for passage over it must not only be granted in express terms, but the rates of such compensation must also be specified in the grant; or the concession in that particular will be void, and no power to levy tolls will be created.

3. When the right to compensation is expressly granted, the concession must be interpreted strictly against the grantee, so that if the language used will bear two meanings, that one of them shall be considered to have been that of the grantor, which puts the lightest burden on the public.

Heddy vs. Wheelhouse, Croke Eliz., 558–591.

The facts in this case were, that King Henry VII had granted to the mayor and burgesses of Northampton, the franchise to hold an annual Fair or Market, in respect to which they should have *all the franchises pertaining to a fair of that kind.*

The question at issue in the case was, whether, under this grant, the power to levy tolls upon those availing themselves of the facilities afforded by such fair passed to the grantees of the principal franchise. And it was adjudged that it did not.

Among other things, the court is reported to have said:

Toll is not incident to a fair or market, and can only exist by special grant from the King, or by prescription.

And if the toll be unreasonable the grant will be void. * * * * * * * By grant of a fair, with all liberties, &c., toll is not due nor demandable; for toll is not incident to a fair, as common experience proves, for the greatest part of the fairs in England have not any toll. *But by express words in the King's grant the grantee may have toll; so he may have pozage or pontage;* for the subjects have thereby a greater benefit for the money they pay for it; *viz:* in one case true weights; and in the other case, of passage over water which was otherwise not well fordable.

Lightfoot vs. Lennett, Croke James, 421.

The facts in this case were, that the King had granted to the defendant, and his heirs, the franchise to maintain two Public Bridges, within the manor of defendant, *with power to take such tolls for the passage of beasts, as should be customary there and elsewhere within the kingdom.*

The plaintiff having driven two animals over one of these bridges, the defendant demanded toll therefor, at the usual rates. Upon refusal of the plaintiff to pay the charge as requested, the defendant distrained the cattle; whereupon the plaintiff brought this action, in trespass.

The question of law in the case was, whether a grant of tolls to be taken for passage over a public way would be valid, without the rates thereof being specified in the grant; *and it was held by the court that it would not be valid unless the rates were specified.*

Proprietors of Stourbridge Canal, vs. Wheeley, 2, *Barn & Adol.*, 793.

The plaintiffs in this case were grantees of the franchise to construct and maintain a Public Canal; with authority to demand tolls at specified rates, *upon boats which should pass through any one or more of the locks.* In pursuance of such charter, the plaintiffs constructed their canal, and kept it open and in repair for public use.

The defendants were heavy operators in mineral coal; and, in the prosecution of their business, transported upon the canal of the plaintiff, large quantities of that substance.

The defendants' mines were so situated, however, that, in transporting their coal to market it was not necessary that the boats used upon the canal should pass through any lock; but only along a level some miles in extent.

The plaintiffs claimed of the defendants for such use of their works, tolls, at rates the reasonableness whereof the latter did not question; and, upon refusal of the latter to pay anything whatever for the very valuable facilities enjoyed, brought this suit to recover the compensation demanded.

The only point in the case was, necessarily, whether the company, in absence of express concession of the right to do so, could collect payment for the use of their canal; and it was determined by the court that they could not.

Among other things, the court is reported to have said:

The canal having been made under an act of parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act. * * * * * * * They (i. e., parliament) probably did not contemplate the case of persons using the canal, who did not pass any locks, *but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the company.*

Corporation of Stamford vs. Pawlett, 1 *Crompton & Jervis*, 57.

The facts in this case were, that Queen Anne had granted to the plaintiff the franchise to hold within its territory, semi-annually, a Fair or Market, for the buying and selling of all manner of cattle and merchandise; together with the right (expressly mentioned) to collect tolls upon property bought and sold at the same. No *rates* of tolls, however, were specified in the letters patent.

In pursuance of this grant, the corporation had, from the period of the grant, regularly held the fair therein mentioned, and had been accustomed to receive a toll of two pence per head for every beast bought at the fair. At a fair held in the year 1828, according to the charter, the defendant purchased eight beasts, for which toll, at the customary rate, was demanded of him, but which he refused to pay. The corporation thereupon brought this action to recover the amount.

The case is entitled to increased authority, because of the eminence of the respective counsel who conducted it—Taunton arguing for the plaintiff, and Denman for the defendant.

The theory of the defendant was, that the grant of tolls was *void*, because no rates had been *specified;* he relying upon *Lightfoot vs. Lennett*, before cited, which he regarded as precisely analogous.

The plaintiff's view of the law—which was that adopted by the court—is expressed in the following extract from the argument of his counsel:

The objection to be made on the part of the defendant is, that no sum certain is stated in the grant of the toll in question; and that no such grant can be good, unless the amount of the toll be specifically set forth. To support this objection several cases will be cited, which, upon examination, will be found not to apply. It may be admitted, as a general proposition, that toll is not necessarily incident to a fair or market, *by which must be understood that toll will not pass by a general grant of market, without more, but, to enable the grantee to take toll, there must be an express grant of toll.* This is laid down by Chief Baron Comyns, title, TOLL. But it is denied that the amount of toll need be stated in a grant of a fair or market. *In the case of a* TOLL THROUGH, *or turn, which is against common right, the amount of the toll must be specified;* but the toll of a fair or market is not contrary to, but consonant with, common right.

The distinction is, that the amount of toll in a fair or market need not be specifically mentioned in the grant; *Whereas, in the grant of a Toll Through, or other toll*

against common right, the amount of toll to be taken, must be specified.

Barrett vs. Stockton & Darlington Ry. Co., 2 *Eng. Ry. & Can. Cases*, 324.

This case shows how strictly against the grantee of the franchise, and liberally in favor of the public, even *express* concessions of authority to levy tolls are to be construed.

The defendant, whose line of road ran from the seaport town of Stockton, into the interior, was expressly empowered, by its charter, to charge for coals passing over the line, rates not exceeding *four pence* per ton per mile; but, for all coals which should be shipped on board vessels at Stockton, for "*Exportation*," the Company was restricted to *one half penny* per ton per mile.

Barrett, who shipped largely by the Company's line, put his coals on board vessels at Stockton, and took them, coastwise and by river, to London. This he claimed to be an *Exportation* of his coals, within the meaning of the charter; and insisted that he should pay upon them only the half penny rate.

The corporation contended, in answer to this claim, that shipment to an English port could not be deemed exportation.

The ground taken by Barrett was, that the word Exportation does not, in all cases, signify the carrying abroad, to foreign ports; that it *may* mean the taking from one port to another, in the same country; and that the Company must suffer the latter construction of the term, since it would be most favorable to the public.

The court, in view of the fact that the question involved was, as to which of two *taxes*, unequal in amount, had been laid upon the public, held that the Company must be restricted to the *smaller*, if that construction could be put upon the charter; that the word Exportation would bear the meaning claimed for it by Barrett, and gave judgment for him.

The corporation removed the cause, by writ of error,

into the Exchequer Chamber; and from thence into the House of Lords, but the judgment of the Common Pleas, and the reasoning by which it had been reached, were unanimously affirmed.

Beside the cases cited, the following English cases tended to the same point:

Leeds and Liverpool Canal Co. vs. Hustler, 1 *Barn. & Cress.*, 424.

Dock Co. vs. La Marche, 8 *do.*, 42.

Same, vs. Brown, 2 *Barn. & Ad.*, 58.

In each of these three cases, the holder of a franchise to maintain a public canal or wharf, was denied the right to charge for some particular use of it, on the simple ground of want of *express* authority to do so.

In America, the cases involving like questions have, with scarcely an exception, spoken the language of the English authorities.

Of the cases decided by this court, the following are most directly in point: although several others have recognized and enforced the same general principle.

Charles River Bridge vs. Warren Bridge, 11 *Pet.*, 420.

The facts in this great leading case are so familliar to all lawyers, that any statement of them here would be useless.

In pronouncing the opinion of the court, the Chief Justice, after referring at some length, and approvingly, to the case of *The Proprietors of Stourbridge Canal vs. Wheeley*, before cited, said:

Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanc-

tioned in an English court? Can any good reasons be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction, in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charters; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established. In the case of the *United States vs. Arredondo*, 6 *Pet.*, 691, the leading cases upon the subject are collected together by the learned judge who delivered the opinion of the court; and the principle recognized that, *in grants by the public nothing passes by implication.*

Perrine vs. Chesapeake & Del. Canal Co., 9 *How.*, 172.

The facts in this case may be briefly stated thus:

The defendant was granted by the States of Maryland and Delaware, the franchise to construct and maintain a public canal, connecting the waters of Delaware and Chesapeake Bays; and was also granted, in express language, the further franchise to collect tolls upon merchandise of all kinds, and upon empty boats, that should pass through the canal, at specified rates. Nothing, however, was said in the charter concerning tolls upon packet boats or upon persons travelling along the canal in such boats.

Perrine, desiring to put a line of packets upon the canal, devoted mainly to passenger traffic, applied to the Company to state the terms on which such boats would be permitted to traverse the canal. The Company replied, requiring payment of toll at a certain rate for each passenger

transported. Perrine refused to accede to the terms named; but offered to pay tolls upon his packets as upon empty boats; and the Company declining to accept his offer, and further declining to permit his packets to navigate the canal except upon compliance with its own terms, he commenced this suit against the Company, in the Circuit Court of the United States, for the District of Delaware, to vindicate his rights in the premises.

A division of opinion occurring between the judges of the Circuit Court, the following questions were certified to this Court:—

1. Is the canal company entitled to charge the compensation or toll mentioned in the proceedings, for passengers on board the complainant's boat passing through the canal?

2. Has the complainant a right to navigate the canal, for the transportation of passengers, with passenger boats, paying or offering to pay toll upon the boats as empty boats, or upon commodities on board, but without toll or compensation for passengers, as proposed in the correspondence contained in the exhibits?

This court, applying to the company's charter the rules of construction enunciated by the English authorities herein cited, answered the first question in the *negative*, and the second in the *affirmative*.

Binghampton Bridge Case, 3 *Wall.*, 57.

In this case this court used the following language:

In the case of the *Charles River Bridge*, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, *and that, in grants by the public, nothing passes by implication.* This Court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way.

In the courts of the several States, the same principles have been received and applied, as sound law.

Canal Bridge vs. Gordon, 1 *Pick.*, 296.

In this case, all right to tolls for passing over a bridge, were denied to its proprietors, for the sole reason that the charter, by which the bridge was authorized to be built, was silent in respect to tolls.

Camden and Amboy R. R. Co. vs. Briggs, 2 *Zab.*, 623.

This case, decided by the Court of Errors and Appeals of New Jersey, is as strong a one in favor of the doctrine as well could be imagined.

The Company was organized to construct and operate a line of transit between New York and Philadelphia.

It was to build a line of railroad from Camden, opposite the latter place, upon the Delaware river, to South Amboy, on Raritan Bay. To complete the connection between the two great cities, its charter required it to maintain a line of boats between South Amboy and New York, a distance of some thirty miles; and another line, on the other end of its route, between Camden and Philadelphia, a distance of some two miles.

The Company's charter authorized it to demand such sum or sums of money for tolls, and for the transportation of every species of property over its road, as it should, from time to time, think reasonable and proper; provided they should not exceed certain specified rates. The leading questions in the case were:

1st. Whether the express permission to charge tolls extended to anything more than the railroad; and,

2d. If it did not extend to the water part of the route, whether anything, whatever, could be charged for transportation over such portion of the line.

The court answered both questions in the negative; asserting, as did this court, in *Perrine vs. Chesapeake and Delaware Canal Co.*, *that no such thing can exist, as an implied, or common law, right, to demand a toll for passage upon a public line of transit.*

Particular attention is called to the remarks of the Chancellor, on *p.* 641; of Randolph, J., on *pp.* 646-7; and and of Sinnickson, J., on *p.* 664.

The reason why a grant of the franchise to provide the public with a highway does not, under the rule of law for the interpretation of such grants, confer upon the grantee the power to collect fees for the use of such way, is to be found in the nature of the power itself.

Tolls being nothing other than *Taxation*, under a specific form, the power to levy them must be something distinct from all other powers that may be delegated by governments to individuals.

To levy tolls is a franchise of itself; and not an *incident of*, nor an *appurtenant to*, a franchise; nor something *included within* one.

The reason, therefore, in law, why the grant of the franchise to maintain a public way will not carry with it the right to collect pay for passage over it, is the self-same reason why a conveyance of farm A. will not transfer with it title to farm B.

The power of taxation, under any form, is a power complete in itself; and it does not form a branch or part of any other power. It will not, therefore, pass under a grant of any other power.

The defendants in error fail to understand, why the the rules of law above stated, and the authorities above cited to illustrate those rules, do not apply with full force to railway franchises. In truth, two of the most important of the cases referred to—*Barrett vs. Stockton & Darlington Ry. Co.*, which was finally decided in the House of Lords, and *Camden & Amboy R. R. Co. vs. Briggs*—were in relation to franchises of that very description, and they held those rules to be applicable to such franchises in every particular.

If the fees collected by those holding such franchises be, as the defendants in error maintain, *tolls*, there is the end of the question, at once.

But in any view, the enterprise of maintaining and operating a public line of railway has no essential element in

a legal point of view, not shared by that of constructing and maintaining a canal, ferry, bridge, or turnpike road. Nor can it claim any preference over enterprises of the kind latterly named, based upon grounds of natural justice, and fair dealing between man and man.

1. All the undertakings named are, in every part, public franchises, of the same general character.

2. All alike involve the expenditure of private capital, at every stage; and the bestowal of the more or less constant personal services of the proprietors, and of their agents and servants; and responsibility for the diligent and careful performance of the public duties annexed to the undertaking.

3. From all of them, individuals using the facilities afforded derive valuable advantages.

The undertakings named being alike in these particulars, on what ground can any difference arise, as to how their promoters may derive power to collect fees from those immediately profited by the facilities which they respectively afford? It is impossible to see how.

If the mere use for passage, of a public bridge or ferry, that can only be erected and maintained under a franchise to do so, and by means of a constant expenditure of private capital and services, cannot confer title to compensation for such use; it is impossible to see why the mere use for passage, of a public railway, built, maintained, and operated under authority, and by means, no different, could.

IV.

THE STATUTES RELATIVE TO THE PLAINTIFF IN ERROR—WHETHER THEY CAN BE CONSTRUED TO EMBRACE A GRANT OF THE FRANCHISE TO LEVY TOLLS.

Unless the authorities before cited are all wrong, this Court will be left with nothing to do but to search the Company's charter for *express words* conveying to it the power of taxation which it claims.

The existence of such words was persistently urged by the Company upon the court where the suit was originally brought, and formed one of the chief points of discussion there.

That court, however, after full argument, and long deliberation, failed to find any such words, and overruled the company's position on that branch of the case.

See findings of the District Court in the printed Record.

As the District Court held, there is no such grant to be found in the charter, in direct language. It is nowhere in any of the acts relating to plaintiff in error, even attempted.

No *express* grant of tolls can exist in any part of the charter, where tolls are not named; for the moment expression is absent, *inference* must be resorted to, to make out the grant, if it have any being.

Of the act of 1855, from whence the Company's franchises are almost exclusively derived, the only section mentioning tolls, or charges of any description, for the use of the road, is *Sec.* 13. *Ante p.* 4.

The object of this section was clear. It was designed for nothing else than to prevent imposition upon the public by those who might personate employees of the Company, for fraudulent purposes.

Of the act of 1857, *Sections* 3 *and* 8 are all that speak of compensation. *Ante p.* 6.

The former section was introduced because Congress

made that one of the conditions of its grant of lands, which the Legislature was giving to the Company by the act. If, therefore, the question at issue were to be decided by implication even, that section would afford no light; for the section does not embody any *original intention* on the part of the State; but it is a literal, and mechanical act of obedience to the conditions of its trust over the lands.

Sec. 8 is like Sec. 10, of the act of 1862.

The difference between them is merely that while the former enjoins reciprocity with the Root River road, the latter requires it generally with all roads whose lines it crosses. The object of both sections was to prevent that injury to persons having business or residing on connecting lines of road, which might, and so often does, result from the fierce jealousies of rival corporations.

The language with reference to charges is explanatory of the meaning of that proviso of the extension act of 1866. The section reads "on the same '*terms*,' and at no greater '*rates*.'"

The latter word, only, is applied to compensation; and the former to other conditions. They are not designed to be used synonymously.

We pass now to the proviso of the act of 1866. *Ante p.* 8.

"*Terms*" is the word used. It is defined by lexicographers to mean "conditions." It is sometimes used to signify price, in part, but rarely that alone.

Webster defines the word this way:

"In contracts, *terms*, in the plural, are *conditions*; propositions stated, or promises made, which, when assented to or accepted by another, settle the contract, and bind the parties."

Price or compensation are not mentioned in the definition, although it sets out *fourteen* different classes or shades of meanings.

We have seen that the Legislature, in the next preceding act, relating to this defendant, used the word as mean-

ing something else besides tolls, and it would be fair to infer that it was to mean the same thing here as in that act.

But, as the court remarked in *Barrett vs. Stockton and Darlington Ry. Co., supra*, it will be enough, for the purposes of this case, if the word will fairly admit of two meanings.

It it *may* mean tolls, and this proviso could be construed into a grant, such construction would lay a tax upon the public; and unless all the courts of England erred in *Barrett's* case, in construing the word Exportation, it must not be given that meaning, if any other, more favorable to the public, can be put upon it.

In respect to this proviso, Barrett's case is exactly in point. Substitute "terms" for "exportation," and they are the same thing.

Not only will the word bear, fairly, other constructions, more favorable to the public than that which ~~defendant~~ the company contends for; but to give to it ~~defendant's~~ the Company's construction, would be to assign to it a signification which no lexicographer lays down.

There are one or two principles applicable to all these provisions, which exclude the theory of their being *grants* of anything, or being intended to be such.

In the first place, none of them contain any granting words; their language is that of restriction; and restriction, too, upon the Company; never upon the public.

They are not concessions to the public of any rights, and so to be deemed to be made with conditions; for the rights of the public, come from the fact, alone, that the plaintiff in error is engaged in performance of a public function; and were completely assured by that party's *acceptance* of the function.

They are designed for the better *protection* of the public, from the rapacity of the Company; and not to *restrict* the public in the use of the road.

The convenience of the public, and not the gains of the

Company, was, beyond doubt, in the minds of the Legislature, when the provisions in question were enacted.

These provisions are, one and all, of the same character as those in the charters of the Canal Co., in *Perrine's* case, in which it is professed to find a restriction of the rights of the public to transportation of property.

The answer of the court to the pretensions of the Canal Company in that case, will fairly meet those of the Railroad Company in this:

The provisions were designed to limit the rights of the corporation itself; and not to limit the rights of the public; and that a limitation intended for itself, cannot be shifted on to the public by the Company.

Perrine vs. Ches. & Del. Can. Co., 9 *How.*, 172.

The provisions mentioned are all which speak of tolls. They, manifestly, do not grant them. If, therefore, the plaintiff in error can levy tolls at all, the power *must* be derived by implication.

The cases before cited ought to be a complete answer to any such derivation.

But, from what portions of the acts are tolls to come, even by inference, and not overrule all cases upon construction of charters?

A grant by *implication*, as well as by *expression*, must come from some *particular* provision. There must be some *part* of the act, which, in itself, actually *amounts* to a grant although the subject matter can only be acertained by construction.

A grant of right to lay a tax, cannot float loosely around the whole expanse of a charter, but must be anchored down to some particular spot. It must be localized.

Where is *the very part* of the Company's charter, which constitutes such implied grant?

Sec. 4, of the act of 1857, commutes taxation of property held by the Company, to payment of *three per cent.* of its gross earnings. *Ante p.* 6.

That section cannot, however, by the most violent con-

struction in the Company's favor, be shaped into a *grant* of anything. The subject matter, and the entire subject matter, of the section is, what the Company shall *pay* to the State; and, to no extent, what it shall be entitled to *have* of the public.

The most favorable view that could be taken of that section is, that it may be *evidence* tending to show a grant somewhere else; but it is not itself a grant, nor does it add anything to any other parts of the charter; making them concessions, where they would not have amounted to such without.

Furthermore, it may be said of this, what is equally true of all the parts of acts where charges are spoken of: that it may be, at any time, repealed, and the mouth of the Company would be closed against complaining. Not, indeed, that the State could impose any *greater* tax upon the Company; but it might make the present less, or abolish it altogether.

If the power to levy tolls can come from liability to pay a tax on gross earnings, it must follow that, if defendant were to be made free of all taxes, the most valuable franchise which it claims, would be gone.

Sec. 1. of the act of 1855, (*ante p.* 5,) embodies no concession of any franchise, save that to be a corporation.

If the section had stopped short by saying that the persons named should be a body politic, under the name of the Transit Railroad Company, every power therein enumerated would have followed by implication, just as surely as it has now, by expression; for all these powers are included within the very definition of the term Corporation.

Sec. 2, of that act, empowers the Company to construct, operate, and maintain a railway.

If the plaintiff in error has any *implied* power to levy tolls, it must come from this section; and from this, merely as a result of the right to build and carry on the road.

However, all the English authorities cited, and *Perrine*

vs. Chesapeake and Delaware Canal Co., Camden and Amboy Railroad Co. vs. Briggs, and Canal Bridge vs. Gordon, show conclusively that the right to levy tolls is one which never is, and never can be implied from the grant of any other right.

If it were, or could be, all those cases would have gone the other way.

It must be borne in mind that in none of those cases, was any use made of the rule, Expressio unius, &c. It was not even alluded to in one of them.

Indeed, in *Canal Bridge vs. Gordon*, no tolls whatever were expressed, and all right to any was denied.

The very ground on which the claimant of the toll, in each case, was forced to rely, was, that the right to build his wharf, canal, or railroad, carried with it, as an incident, right to demand a toll for its use.

If the law implies a right to tax for one use, it must imply like right to charge for all uses; if it implies a right to tax for passing the locks of a canal, it must imply like right to tax for traversing levels; if it implies a right to tax for transportation of freight and empty boats, upon a canal, it must imply like right to tax for passengers, and for the packet in which they ride; if it implies a right to tax for freight and passengers upon a railroad proper, it must imply like right to tax for the same upon the water route at either end.

In each of these cases, it was resolved that *some* services must be performed for the public *gratis;* that *some* use of the Company's property was open to the public without charge.

The proviso in the same act, that the directors may do all things necessary, and not inconsistent with the laws of the territory, or with the provisions of the act itself, has no effect to enlarge the Company's powers. (*Ante p.* 3.)

No right amounting to a franchise could pass under such words. For, if one franchise could pass in that way all

could; and the Company's powers would practically be without limit.

Suppose no express grant of the power of eminent domain had been made; would this provision authorize the condemnation of lands and materials for the construction of the road? That power was necessary to enable the plaintiff in error to build its road; without that power its road must have remained unbuilt to this day; but it would hardly be argued that the Company could derive that power from such a source. Money has always been essential to carry on the Company's operations. Could it, under that clause, start a bank and issue currency? If not, why not, except that no franchise can pass in such a mode.

Besides, since the common law was in force, at the enactment of the statute containing the provision in question, in the Territory of Minnesota, it would have been "inconsistent" with the laws of such Territory, to use a power in the nature of a franchise, that had not been granted to the party using it, in express terms.

The conclusion is unavoidable, by any process of reasoning, that the right to levy taxes upon the public in the form of tolls is not one of those powers which the plaintiff in error has acquired by its charter; and, therefore, not one of which it could, prior to the passage of the act in question, lawfully exercise. The Company's charter contains expressions undoubtedly indicating that the Legislature would have been willing to grant such power; but, until the passage of the very act which the plaintiff in error impeaches, such power was not actually given.

When it is considered that the rule had, for centuries, been perfectly settled in the common law, that in grants of public franchises nothing passes by implication; and when it is further considered, that the Legislature which enacted the several statutes relating to the plaintiff in error must conclusively be presumed to have known that rule; how can it be supposed that such Legislature intend-

ed the Company to acquire the franchise to levy tolls under any of the acts it passed?

Legislative grants and contracts stand on grounds peculiar to themselves, in this particular as well as in others: That, in cases of grant by individuals the terms of the grant are almost universally first discussed and settled orally between the parties; and the written instrument whereby the grant is formally evidenced may always be regarded as but the reduction to writing of a transaction before agreed upon; whereas, in the case of Legislative grants, the inception of the grant lies in the written offer of the State, and its consummation only in the naked acceptance of the offer as embodied in the statute or charter.

In construing grants of the former class, much may well be allowed for the infirmity of language, and for unavoidable errors in the reduction of the transaction to writing; but in construing those of the latter class, it must always be remembered that the statute or charter itself is the whole transaction; and no allowance can be made in regard to it, by reason of the causes stated. Those who accept and act upon a Legislative grant, are bound to know that which they are undertaking; and can never be permitted to allege a misapprehension of its terms, nor to demand a liberal construction of such terms in their favor, on the ground that hardship would result to them from a construction according to the settled rules of law for interpreting public grants.

Whatever has been done by the plaintiff in error, under its charter, has been done voluntarily. The grant embodied in that instrument was not thrust upon the persons composing the Company; but was freely accepted, if not actively sought after by them.

The reasons why the State failed to include within the Company's charter a concession of the franchise to take tolls, and why the company accepted a charter not containing such a concession, are not within the province of this case.

The *fact*, is all with which this case has to do.

It is most probable that the subject was either overlooked, or was purposely left to be acted upon in the future, when the means of judging of the rates proper to be granted would be at hand.

If, however, the Court should be of opinion that the omission occured through mistake, accident, or inadvertance, the Court could not rectify or supply it, or treat the charter as if it had actually been included.

See *Stourbridge Canal Co. vs. Wheeley, supra.*

Should the court deem the position of the defendants in error, that the franchise to levy tolls for use of its cars and road did not become vested in the plaintiff in error by virtue of its charter, consideration of points in the case other than those already discussed herein, will be needless.

In taking that position, though, the defendants in error were not moved by a belief that its correctness is essential to their success in the case; but only by a thorough confidence in its soundness, and by the consideration that if it be sound, it is enough, in and of itself, to repel the attack made by the plaintiff in error upon the statute in question in the case.

If, however, the court should be of opinion, that the statutes relating to this Company, ante-dating the passage of the regulating act, can be construed to embrace a permission to the Company to collect pay for use of its road and cars; the further question will present itself for solution, whether such permission be of a character to import a promise on the part of the State not to pass laws to regulate the rates of such compensation.

Of this possible question, the defendants in error, as stated at the outset of this brief, maintain the negative: and their reasons for so doing, in so far as the same have not been embodied in what has already been said herein, will be set forth in what follows.

V.

The Legislative Power of States—how it can be parted with over Persons and Things within their Territory.

It must be considered an indisputable proposition, that, in all governments, a power somewhere resides, having absolute supremacy over men and things within its territoral jurisdiction.

Black. Comm. Vol. I., (*marg. p.*,) 49.

Forms of government do not relate to the *extent* of their sovereignty; but only to the *mode* in which, and the *persons* by whom, such sovereignty shall be exercised. A republic, or even a pure democracy, is as perfectly supreme throughout its territory, as is a monarchy of the most absolute character.

In this country, the principle is universally recognized, that sovereignty is primarily vested in the body of the people. The sovereignty thus vested is exercised as to certain enumerated objects through the government of the United States, and as to all other objects, through the governments of the several States.

Sovereignty is expressed by *Legislation.* Indeed, the two terms are said by a great lawyer to be convertible.

Black. Comm., Vol. I. (*marg. pp.*) 46, 49.

By the constitutions of the several States forming the Union, all legislative powers exercisable by the body of the people forming the particular State, are delegated to the Legislature thereof, with such exceptions only as are in the same instruments expressed.

The Legislatures of the several States, therefore, enjoy complete supremacy, in so far as the same can be exerted by the passage of laws, over all persons and things within the State boundaries, except—

1st. As to matters entrusted to the Federal Government.

2d. As to matters about which the several States have, through the Federal constitution, obligated themselves not to legislate, or not to legislate in certain ways.

3d. As to matters about which the particular State has, by its own constitution, forbidden the Legislature to pass laws, or bidden it to pass laws only of particular characters.

Cases falling within these exceptions must, comparatively speaking, be few.

Hence, the power of a State Legislature, to regulate, *by law*, the conduct of all inhabitants of such State, and the modes whereby all property located within the State may be enjoyed and transferred, must be deemed very nearly *absolute*.

It must, however, not be understood that the term *law* is used in the proposition just stated to signify every possible mandate that the legislative department of a State may chance to utter; but only to signify such enactments as correspond to the term Law, as laid down by universally acknowledged authorities.

In discussions relating to the scope of legislative jurisdiction over persons and things, both in adjudged cases, and in elementary treatises, reference has sometimes been been made to what has been designated the *Police Power* of States. And, whether so intended or not, the idea always conveyed has been, that the Police Power is a thing distinct from the ordinary powers vested in legislative bodies; that it is an extraordinary power; a power in extent far surpassing those by virtue of which the great body of laws comprising the jurisprudence of states are enacted; and that, by means of it, much legislation can be accomplished that would be impossible under the ordinary law-making power. It has not unfrequently been said, by judges and lawyers, that some particular statute, going to more than usual extent in its operation upon the care and enjoyment of property, or upon the conduct of individuals, was warranted by the "Police Power;" as if that power

under which laws are passed regulating the transfer of property, and the manner of its descent upon the death of its owner, would be inadequate to support the piece of legislation in question.

Attempts have even been made to frame a definition for "Police Power," as a distinct branch of the powers of government; however, not, it is believed, with results wholly satisfactory even to those who have made the effort.

Thus it has been said, in effect, that the "Police Power" extends to the lives and limbs of the people; and to the safety of their persons, their healths, their property, and their good names; and the idea has been in the same connection advanced, that, to insure such safety, that power would support laws much more extensive in their action upon private possessions, than could be sustained for any other purpose.

But any attempt to separate so indivisible a thing as law-making power into parts; and to assign to such parts names and ranks in the scale of sovereignty, should be disapproved, as not merely inaccurate, but confusing. It is believed that no State constitution recognizes any such branch of sovereignty as the "Police Power;" or measures the extent of jurisdiction to legislate concerning the use of property, or the actions of persons, by the nature of the end sought to be accomplished.

The right theory clearly is that the power vested in State legislative bodies to enact laws, is one and the same power throughout its extent. It is complete dominion, less certain small fragments here and there detached and left remaining in the body of the people.

This truth was stated with great force by Chief Justice Taney in a celebrated case decided by this Court. He said:

But what are the police powers of a State? They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominion. And whether the State passes a quaratine law or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same

power; that is to say, the power of sovereignty; the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.

License Cases, 5 *How.*, 504 (583.)

Whenever, therefore, the question presents itself, how far a State Legislature may go in regulating by law the use of private property, or the actions of private persons, it will not be material to inquire whether the object of the law is to promote the safety of life or limb, or to enhance material prosperity, by rendering the movements of commerce easier and less expensive.

The extent to which State laws may go in their action upon the conduct of persons, and upon the modes whereby property may be enjoyed and transmitted from one to another, can only be ascertained by examining those positive restraints put upon legislative power by the organic law of the State, and by that of the Union.

The constitutional limitations chiefly relied on in this country, to protect private property and private personal rights of pecuniary value, against unwarrantable encroachments by those wielding the powers of government, are two in number:—

1. That which forbids the *taking* of private property for public use, without just compensation; and,

2. That which forbids that any man shall be *deprived* of his property, &c., except by due process of law.

The first of these limitations must be conceded to apply with like force to all departments of government; to the legislative as well as to the executive.

But, to fall within either the letter or the spirit of the limitation, the taking must be adverse; it must be against the will of the owner; the owner must be left without

option whether he will part with the property or retain it. No law, therefore, not requiring the owner of property to yield it up to another, willing or unwilling, would be inconsistent with this particular limitation.

A law might impose harsh and unjust conditions upon the transfer of property, in case the owner should choose to transfer it; but if it should not go further, and make the transfer itself obligatory upon the owner, this limitation would not forbid its passage.

The precise scope and force of the second of the enumerated limitations, ought not now to be in this country the subject of any doubt; as its meaning had been for centuries completely settled in the English law, before its reenactment in the constitution of the United States, and in those of the several States.

The effect of this limitation has always been understood in the country whence we derived it, to merely prohibit action by any department of government in a mode not permitted by law; and not at all to prohibit the enactment of such laws as the legislative department should consider to be demanded by the public interests.

It does, unquestionably, warrant to the individual:

1st. That any mandate which shall deprive him of his property, shall be a *law;* that is to say, a resolution of the legislature, enacted in due form, future in its operation, and applying to all persons in the same situation; and,

2d. That the enforcement of the law shall be by *due process;* that is to say, he shall be entitled to have an adjudication, upon due notice, and with opportunity to be heard, by the appropriate tribunal, whether or not his particular case falls within the law.

More than these things, the limitation in question has never been supposed in the mother country to guarantee to the citizen. If the limitation has ever acquired more meaning in this country, than it had when brought here by

the men who brought the body of that law of which it formed a part, it is not known to the defendants in error how or when such increase took place.

But, if this limitation could be deemed to operate as a restraint upon the passage of laws relating to private property or services, like the limitation first considered, it could only prohibit the enactment of such statutes as should have effect to take a man's property from him. The word *deprive*, will not bear any other meaning, and has never borne any other, even among the people, than *to take away*. No law, therefore, which leaves a man's property still remaining in his possession, and under his dominion, deprives him of it, or conflicts with the limitation under view.

The two constitutional limitations spoken of, may be said to substantially comprise all exceptions to the supremacy of State Legislatures over the tenure and enjoyment of private property. It may be admitted that these limitations secure to the owner of such property his title and possession; but the modes in which he may enjoy such property; and the terms on which he may transfer it, or permit others to use it; must be matters concerning which legislative power is absolute.

A State Legislature has jurisdiction to prohibit the use of property for particular purposes, and even to prohibit its use for any but certain specified purposes. It may go further, and make it unlawful to hold and own particular kinds of property at all. It may even absolutely forbid the sale of property. In short, it may pass any law regulating the tenure and enjoyment of private property, which leaves title and possession undisturbed, with liberty to use the property for *some* purpose, beneficial to the owner. It matters not that the necessary effect of such law may be to practically annihilate the exchangeable value of the property; for that is something not protected

against the law-making power, under any system of jurisprudence, or fundamental law, that has ever been devised.

The great body of the jurisprudence of any country has to rest upon such an unlimited power. With any less power, most laws which regulate the commonest dealings between man and man would fall to the ground. Without such power, how could Legislatures say, that the owner of lands shall be unable to pass any title in them to another, unless he does so strictly according to a single mode pointed out? Without such power, how could a Legislature say, that upon the owner's death, property shall become vested in persons standing in certain specified relations to the decedent?

It is only because of the existence of such power that the sale, bestowal, and even the right to own, intoxicating liquors can be forbidden by law.

Wynehamer vs. The People, 13 *N. Y.*, 378.

Nothing short of such power could have authorized the Legislature of the State of Louisiana to forbid the landing, yarding, or slaughtering of animals, at any point except one, within a district of country over 1,000 square miles in area, and containing a population of several hundred thousand souls, and that one point to be owned and controlled by a few specified individuals.

Slaughter House Cases, 16 *Wall.*,

The terms on which title to, or the use of, property, may be transferred, as well as the terms on which services of pecuniary value may be rendered, must be matters almost completely within the dictation of the Legislature. And while the law-making power cannot declare that the owner of property *shall part with it*, or with the use of it; it, however, can, undoubtedly, say, that when he shall *elect to do so*, he shall have no right to demand more than a certain consideration therefor.

Examples of the actual use of legislative power in that way, are to be met with on every hand.

From time immemorial, the right to regulate both the

price and the manner of particular classes of services, and the enjoyment of particular kinds of property, has been exercised by the State, both in the mother country and in this one.

Wherever business is of such a nature that the convenience of the public generally, or even of large numbers of people, depends, to any considerable degree, upon its efficient performance at fair rates; and chances are, therefore, proportionately great to oppress the public by unfair or extortionate charges; the State has always deemed such business a rightful subject of legislation; and has often felt obligated to fix the rates of compensation connected with it.

For instance, in some States of the Union, perhaps in many, laws exist, fixing rates of toll which mill owners may take for grinding grain. Among such States are Michigan, Massachusetts and Indiana; and their statutes are not founded upon peculiar constitutional provisions; but upon general principles of constitutional law. *In Beekman vs. Saratoga & Schenectady R. R. Co.*, the learned Chancellor speaks of the power to limit the tolls which mill owners may take for grinding grain, by statute, to be a thing of course; something becoming apparent to the hearer by its bare mention.

Such power has, however, in practice, been most frequently used in this country in limiting charges of carriers, both of property and of persons, in cities and populous places; not, indeed, because of its application to their business, or to such localities, is any better defined than to any others; but because occasion for its exercise has been much more urgent and frequent. There is probably not a city nor an incorporated town, in any State, but has power to, and does actually, legislate in regard to the fees of porters, draymen, hackmen, expressmen, and the like. Municipal corporations do not derive this power from the fact of their being such; but from the fact that the State had the power, originally, and has, by special concession, committed it to them to exercise.

against the law-making power, under any system of jurisprudence, or fundamental law, that has ever been devised.

The great body of the jurisprudence of any country has to rest upon such an unlimited power. With any less power, most laws which regulate the commonest dealings between man and man would fall to the ground. Without such power, how could Legislatures say, that the owner of lands shall be unable to pass any title in them to another, unless he does so strictly according to a single mode pointed out? Without such power, how could a Legislature say, that upon the owner's death, property shall become vested in persons standing in certain specified relations to the decedent?

It is only because of the existence of such power that the sale, bestowal, and even the right to own, intoxicating liquors can be forbidden by law.

Wynehamer vs. The People, 13 *N. Y.*, 378.

Nothing short of such power could have authorized the Legislature of the State of Louisiana to forbid the landing, yarding, or slaughtering of animals, at any point except one, within a district of country over 1,000 square miles in area, and containing a population of several hundred thousand souls, and that one point to be owned and controlled by a few specified individuals.

Slaughter House Cases, 16 *Wall.*,

The terms on which title to, or the use of, property, may be transferred, as well as the terms on which services of pecuniary value may be rendered, must be matters almost completely within the dictation of the Legislature. And while the law-making power cannot declare that the owner of property *shall part with it*, or with the use of it; it, however, can, undoubtedly, say, that when he shall *elect to do so*, he shall have no right to demand more than a certain consideration therefor.

Examples of the actual use of legislative power in that way, are to be met with on every hand.

From time immemorial, the right to regulate both the

price and the manner of particular classes of services, and the enjoyment of particular kinds of property, has been exercised by the State, both in the mother country and in this one.

Wherever business is of such a nature that the convenience of the public generally, or even of large numbers of people, depends, to any considerable degree, upon its efficient performance at fair rates; and chances are, therefore, proportionately great to oppress the public by unfair or extortionate charges; the State has always deemed such business a rightful subject of legislation; and has often felt obligated to fix the rates of compensation connected with it.

For instance, in some States of the Union, perhaps in many, laws exist, fixing rates of toll which mill owners may take for grinding grain. Among such States are Michigan, Massachusetts and Indiana; and their statutes are not founded upon peculiar constitutional provisions; but upon general principles of constitutional law. *In Beekman vs. Saratoga & Schenectady R. R. Co.*, the learned Chancellor speaks of the power to limit the tolls which mill owners may take for grinding grain, by statute, to be a thing of course; something becoming apparent to the hearer by its bare mention.

Such power has, however, in practice, been most frequently used in this country in limiting charges of carriers, both of property and of persons, in cities and populous places; not, indeed, because of its application to their business, or to such localities, is any better defined than to any others; but because occasion for its exercise has been much more urgent and frequent. There is probably not a city nor an incorporated town, in any State, but has power to, and does actually, legislate in regard to the fees of porters, draymen, hackmen, expressmen, and the like. Municipal corporations do not derive this power from the fact of their being such; but from the fact that the State had the power, originally, and has, by special concession, committed it to them to exercise.

The power to regulate carriers must be general. It must be co-extensive with the boundaries of the State, and must extend to all persons who transact such sort of business.

The power to put limits upon the charges of carriers for short distances, and within incorporated places, must by inference, prove the existence of authority to regulate rates of carriage to any distance, and between all localities of the State.

Other examples of that sort of legislation are presented by State enactments and municipal ordinances regulating the prices of gas and water.

Another example is to be found in statutes establishing rates of compensation for the use of money. Interest laws can stand upon no other ground, save complete legislative dominion over the terms upon which owners of property may permit others to temporarily enjoy it.

In England, for more than a hundred years in modern times, rates of wages of laborers, and prices at which provisions and others of the chief necessaries of life might be sold, were carefully regulated by statute.

In this country, the power to pass laws of that kind has thus far lain dormant; because no exigencies in our affairs have ever called it forth; but that it exists, and could at any time be exerted by the Legislature of any State, does not seem open to argument.

How can legislative power over particular persons and objects be waived?

Were the question new, it might be thought impossible to be done by any mode; but this Court has repeatedly determined that it can be done *by contract;* so that debate upon the point of possibility, must be considered closed.

How can such contracts be made? What has been already said concerning grants by States will afford a complete answer to this question. In such a contract, everything would have to be *express*, nothing could be *implied* or taken by *inference.*

If States can only delegate their powers to selected instruments for exercise, by positive language, they certainly can lose no part of their sovereignty by construction.

VI.

THE GRANT OF THE FRANCHISES TO BUILD, MAINTAIN, AND OPERATE A PUBLIC LINE OF RAILWAY, AND TO TAKE TOLLS THEREON—WHETHER SUCH A GRANT, IN AND OF ITSELF, IMPORTS A PROMISE ON THE PART OF THE STATE NOT TO PASS LAWS TO REGULATE THE USE OF SUCH FRANCHISES.

For purposes of discussion, this topic is logically resolvable into two minor topics:

1. Whether such a grant amounts to a contract at all; and,

2. If it be to any extent a contract, what obligations does it impose upon the grantor.

FIRST.

Is such a grant a *contract*, within the meaning of that term, as used in *sec.* 10, *art.* 1, of the Federal Constitution?

This court, in a case of great celebrity, adjudged that a grant of the franchise to hold and manage private property for charitable purposes—in other words, to be an *Eleemosynary Corporation*—is a contract within the intent of that provision of the constitution.

Dartmouth College vs. Woodward, 4 *Wheat.*, 518.

However, no other franchise save the one specified, was before the court in that case. Consequently, the case must, on settled principles governing such matters, be considered limited as a direct authority, to cases of Eleemosynary Corporations.

To what other franchises the doctrines established by the *Dartmouth College case*, should be extended, certainly

cannot be considered other than an open question; at least to a very large degree. And the question is one which, if it be resolved upon principle, need not occasion many doubts or difficulties. Everything about the question, hinges upon the meaning which the term *contract* bore, when the constitution was adopted.

It was admitted by Chief Justice Marshall, in his opinion in the leading case referred to, that the particular case of grants of franchises was not in the minds of those who framed and adopted the Constitution. *pp.* 644-5.

It cannot, therefore, be claimed, that the term, contract, as used in the provision of that instrument referred to, should be accorded a special, or extraordinary meaning, in order that it may cover such grants, on the ground that those who made the constitution expressly designed it to cover them. But, the term contract in that connection, like all other terms used in the constitutions and statutes of this country, must be defined by the rules of the common law. When the Federal Constitution was adopted, the term was thoroughly understood in the common law; and the nature of transactions to which it was applicable was definitely settled.

The question under consideration, therefore, put into its ultimate form is this: What are the franchises, the grants of which, by the common law of England as it subsisted when the Federal Constitution was adopted, constituted a contract?

In determining the law of any country, upon any given point, the decisions of the courts and the writings of the legal authors of such country, must be regarded the highest attainable authority. Therefore, in ascertaining what was the state of the common law of England, as to any matter, at or about the time this country ceased to be a part of its dominions, reliance upon English judicial decisions, and English law-writers of standard authority, in preference to evidence from any other source, should be deemed entirely excusable.

By the common law, *lay* corporations were divisible into two distinct classes—*eleemosynary* and *civil*—possessing legal qualities widely different.

Eleemosynary corporations were regarded as strictly private in character. Their management was left wholly to the direction of those whence their property had been derived; who were deemed in law to be their founders; and who alone were authorized to be their visitors. The public authorities were not considered legally interested in the conduct of the charities administered by such corporations; and the king had no power, by virtue of his office, to visit them.

Black. Comm., vol. 1, (*marg. p.*) 481, 482.
Phillips vs. Bury, 1 *Ld. Raymond*, 5.

Civil corporations, the common law regarded as *uniform in nature*, whatever might be the particular purposes of their creation. And that law considered the following properties to be inherent in them all:—

1. They all were esteemed to be *public* in character, as contradistinguished from eleemosynary corporations, which, as shortly before stated, were considered to be *private* in quality.

The public character of civil corporations arose from the fact that they were deemed universally to possess political faculties to a greater or less degree. Indeed, this characteristic is indicated by the very term used to designate them; *civil*, signifying something pertaining to the State; something relating to the administration of sovereign functions.

Thus, in a leading case, Lord Holt is reported to have said:

There are two sorts of corporations, the one constituted for public government, the other for private charity. The first, being duly created, although there are no words in their creation for enabling their members to purchase, implead, or be impleaded, yet they may do all these things, for they

are all necessarily included in, and incident to, the creation. 1 *Co.* 30 *b.* 1 *Ro. Abs.* 2., 513. *Tit. Corporations. G.pl.* 2.

And these sorts of corporations are not subject to any founder or visitor, or particular statutes, *but to the general and common laws of the realm;* and by them they have their maintenance and support. But the last sort of corporation, which is constituted for private charity, is entirely private, and wholly subject to the rules, laws, statutes and ordinances which the founder ordains, and to no others, and if the founder has not appointed any visitor, then the law appoints the founder and his heirs to be visitors.

Phillips vs. Bury, 1 *Ld. Raymond*, 5 (8).

So, in a standard English legal work of much later date (1823), it is laid down:—

Corporations aggregate are of two kinds: The one created for public government, the other for private charity. Public corporations being for the good of the community, are governed by the laws of the land, so that the validity of their private constitutions is examined by the King's Courts. Private corporations are subject to the laws made, or empowered to be made, by those who create them.

Petersdorff's Common Law, vol. 6, (*marg. p.*) 608.

The power held and exercised by all civil corporations, as inseparable from their very natures, of enacting by a majority vote of their members, by-laws binding not only upon the entire body, but even upon others transacting business with it, or coming within the limits of its territorial jurisdiction, was deemed in the common law to be political in character, to be a fragment of the sovereignty of the State vested in the members of the corporation.

Blackstone clearly inculcates this idea in the following passage:

To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendun et orandum*, for the encouragement and support of religion and learning. If this were a mere *voluntary* assembly, the individuals which compose it might, indeed, read, pray, study and perform scholastic exercises together, so long as they could agree to do so, *but they could neither frame nor receive any laws or rules of*

their conduct; none at least which would have any binding force, for want of a coercive power to create a sufficient obligation.

* * * * * * * * * *

But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law; as one person, they have one will, which is collected from the sense of the majority of the individuals; *this one will may establish rules and orders for the regulations of the whole, which are a sort of municipal laws of this little republic.*

Black. Comm., Vol. 1, (*Marg. p.*) 467–8.

2 Kyd on Corp. p 103.

The by-laws of civil corporations have the same legal qualities that the laws promulgated by the supreme legislative power of the State have. Like such laws, they do not derive their obligatory force upon individual members of the society from assent in the nature of contract; but from the coercive power of the society. Like such laws, penalties may be attached to their breach. And like such laws, the Courts of the country will enforce them against those subject to their obligation.

The extent to which the statutes of civil corporations have the force of laws in respect to persons and objects, must, of course, depend upon the nature and scope of the powers granted by the particular charter. But, whether the binding force of such by-law, extends to many persons or to few; to many objects or to few; to all persons exercising a particular calling or being within a certain district of territory, or only to the members of the corporation; their character of being exertions of political power must remain the same.

2. All civil corporations were, under the common law, created by *grant* of franchises by the *King*, and *acceptance* of such grant by the *corporators*. It was a fundamental principle of the common law, that no franchise, of any character, could be obtruded upon an individual against his will; and if a franchise were offered by the crown to a subject, he could accept or refuse it at his pleasure.

It was also a fundamental rule of the common law, that when a franchise had been once granted, and accepted by the grantee, it could neither be resumed, nor modified *by the king*, except with the consent of the grantee, or upon lawful forfeiture.

And, in the respects mentioned, all civil corporations stood upon precisely the same footing. The principles stated were deemed to be as applicable to corporations subsisting for municipal purposes, as to those created for the promotion or regulation of particular trades and industries.

In fact, the cases mainly relied on as establishing the inviolability by the crown of vested franchises, were cases of municipal corporations. These cases were:

King vs. Amery, 1 *Term. R.*, 575.

King vs. Passmore, 3 *do.*, 199.

The former case involved the charter of the borough of Chester, and the latter that of the borough of Helleston.

The King of England is as powerless to add to, to subtract from, or to vary, the charter of a city, as that of a company engaged in commerce or manufactures. Even so arbitrary a sovereign as James, found no way to vacate the charters of the American Colonies, without the consent of the Colonists, save by *quo warranto* and judgment of forfeiture; although those charters were for the civil government of a great subdivision of the British Empire.

The reason why the King of England is powerless on his own motion, to modify or withdraw franchises of civil corporations once granted and accepted, must plainly be sought elsewhere, than in such grants being *contracts*, in the legal sense of that term. For no one has ever asserted that concessions of municipal power are contracts; and the disabilities of the King in respect to such charters, are precisely equal to those in respect to any other.

It would not be correct to infer that under the common law, a charter to carry on the business of insurance would be a contract, because the Crown cannot alter it or take it away; since we know that a charter to be a city is no

less inviolable by the Crown, and that such a charter is not a contract.

The true ground, undoubtedly, on which to place the incapacity of the king to resume or modify grants of franchises to civil corporations is, that to do so would be to exercise *legislative power;* and the English constitution has lodged all that power in another department of government. The king cannot make laws; and, therefore, he cannot say that the mode whereby municipalities shall be governed, shall be other than such as the people composing them shall elect to accept. He can, by charter, empower men to make by-laws for the regulation of their own conduct; but he is powerless to legislate for them in the slightest particular.

2 Kyd on Corp. p. 447.

3. Unlike eleemosynary corporations, *the State* was, under the common law, through the sovereign, deemed the *founder* of all civil corporations. Unlike eleemosynary corporations, therefore, under the common law, *the State* was *visitor;* that is to say, *the State* was deemed the proper party to control civil corporations, in all matters, through its Legislature and its courts.

Black. Comm., *Vol.* 1 (*marg. p.* 480), 480–1–2.

Phillips vs. Bury, 1 *Ld. Raymond*, 5 (8).

Nothing could more clearly mark the total unlikeness in the legal natures of eleemosynary and civil corporations than this.

Whenever a society of persons became incorporated by the King's charter, to hold and manage property for charitable purposes, it was a fundamental part of the understanding growing out of that transaction, that those who furnished the property should have the exclusive jurisdiction to say how the charity should be administered, and that the State should not participate in, nor control, its administration.

On the other hand, when a society of persons became incorporated by the King's charter, for civil purposes, it was a fundamental part of the understanding growing out

of that transaction, that the exercise of the powers granted was a matter of public concern, in which the State was directly interested, and therefore, that the State might properly regulate the affairs and conduct of such corporation, in such ways and to such extents as it should deem politic.

4. All civil corporations ~~are~~ were equally capable, in the common law, of acquiring and holding property for the benefit and comfort of the corporators. The source, too, whence all civil corporations derive their funds and property, in the first instance, ~~is~~ was the same—that is to say, from the corporators. Municipal corporations did not afford an exception to the general rule in this regard.

5. The franchises held by the members of a civil corporation were, in all cases, deemed in the common law to be valuable personal rights; for disturbance of, or interference with, which, action for damages lay. And this principle applied with like force to municipal corporations as to any other.

Ashby vs. White, 2 *Ld. Raymond*, 938.

It is true that the benefits derived to the corporators from municipal corporations were not in shape of money dividends; but the good government and the facilities for the enjoyment of private property which such corporations brought to their members, afforded to them benefits of great and direct pecuniary value, in the enhanced worth of such property.

As *civil* corporations are so radically unlike *eleemosynary* corporations, in essential legal attributes, it is difficult for the defendants in error to understand why the doctrines of the Dartmouth College case necessarily apply to civil corporations; or why the judgment in that case conclusively holds charters of civil corporations to be contracts within the meaning of the constitutional provision before referred to.

The following points are to be noted in reference to that case.

1. The decision seems to have been put by the Court strictly on the ground that the college was a *private charity;* and care seems to have been taken to prevent any inference that the Court intended its judgment to determine the law in regard to corporations not of an eleemosynary character.

Thus, Chief Justice Marshall, in his opinion, says:

> But if this be a private eleemosynary institution, endowed with a capacity to take property *for objects unconnected with government*, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. *p.* 630.

Again:

> Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public, for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. *p.* 635.

Again:

> From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; &c. *pp.* 640–1.

The main portion of Mr. Justice Washington's opinion is devoted to showing that Dartmouth College was strictly an eleemosynary corporation, and not a civil corporation.

Mr. Justice Story, in his opinion, remarks:

> From this summary examination, it follows, that Dartmouth College was, under its original charter, a private eleemosynary corporation, &c. *pp.* 681–2.

of that transaction, that the exercise of the powers granted was a matter of public concern, in which the State was directly interested, and therefore, that the State might properly regulate the affairs and conduct of such corporation, in such ways and to such extents as it should deem politic.

4. All civil corporations ~~are~~ were equally capable, in the common law, of acquiring and holding property for the benefit and comfort of the corporators. The source, too, whence all civil corporations derived their funds and property, in the first instance, ~~is~~ was the same—that is to say, from the corporators. Municipal corporations ~~do~~ did not afford an exception to the general rule in this regard.

5. The franchises held by the members of a civil corporation were, in all cases, deemed in the common law to be valuable personal rights; for disturbance of, or interference with, which, action for damages lay. And this principle applied with like force to municipal corporations as to any other.

Ashby vs. White, 2 *Ld. Raymond*, 938.

It is true that the benefits derived to the corporators from municipal corporations were not in shape of money dividends; but the good government and the facilities for the enjoyment of private property which such corporations brought to their members, afforded to them benefits of great and direct pecuniary value, in the enhanced worth of such property.

As *civil* corporations are so radically unlike *eleemosynary* corporations, in essential legal attributes, it is difficult for the defendants in error to understand why the doctrines of the Dartmouth College case necessarily apply to civil corporations; or why the judgment in that case conclusively holds charters of civil corporations to be contracts within the meaning of the constitutional provision before referred to.

The following points are to be noted in reference to that case.

1. The decision seems to have been put by the Court strictly on the ground that the college was a *private charity;* and care seems to have been taken to prevent any inference that the Court intended its judgment to determine the law in regard to corporations not of an eleemosynary character.

Thus, Chief Justice Marshall, in his opinion, says:

But if this be a private eleemosynary institution, endowed with a capacity to take property *for objects unconnected with government*, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. *p.* 630.

Again:

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public, for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. *p.* 635.

Again:

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; &c. *pp.* 640–1.

The main portion of Mr. Justice Washington's opinion is devoted to showing that Dartmouth College was strictly an eleemosynary corporation, and not a civil corporation.

Mr. Justice Story, in his opinion, remarks:

From this summary examination, it follows, that Dartmouth College was, under its original charter, a private eleemosynary corporation, &c. *pp.* 681–2.

Again, he says:

Some of these corporations are, for the particular purpose to which they are devoted, denominated spiritual, and some lay, and the latter are again divided into civil and eleemosynary corporations. *It is unnecessary, in this place, to enter into any examination of civil corporations.* *p.* 668.

2. Another ground—though one necessarily resulting from the eleemosynary character of the corporation—whereon the court based its judgment was, that the college had not been created to exercise any function primarily belonging to the State; and that, in the prosecution of its concerns it did not use any such function.

The circumstances surrounding the case made it highly proper that the court should pass upon this point in express terms; although it might well have left it to that necessary inference which resulted from the finding that the college was not a civil corporation.

The judgment of the Supreme Court of New Hampshire, in upholding the amendments to the charter as valid laws, had gone largely upon the idea, that public education is a matter primarily entrusted to government; and that Dartmouth College was but an instrument in the hands of the State for fulfillment of its duties to the public in that behalf. Such, too, had been a leading position assumed in this court by the counsel for the defendants in error.

Upon this point, in addition to what has already been quoted, the Chief Justice, among other things, said:

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? *p.* 634.

And again:

From the fact then, that a charter of incorporation has

been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created.

The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes.

The same institutions, created for the same objects, though not incorporated, would be public institutions, and of course, be controllable by the Legislature.

The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution. *pp.* 638, 639.

So, Mr. Justice Washington, in his opinion, said:

It has been insisted, in the argument at the bar, that Dartmouth College was a mere civil corporation, created for a public purpose, the public being deeply interested in the education of its youth; and that, consequently, the charter was as much under the control of the government of New Hampshire, as if the corporation had concerned the government of a town or city. But it has been shown that the authorities are all the other way. There is not a case to be found, which contradicts the doctrine laid down in *Phillips vs. Bury*, namely, that a college founded by an individual or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government, p. 665.

It cannot justly be considered, that the charter of a railroad corporation, (at least in so far as it is a grant of power to build, maintain, and operate the road, and to take tolls for the same, and of power to hold, enjoy, and manage such franchises, as a body politic,) constitutes a contract, within any sense ever annexed to that term by the common law, or even within that enlarged sense annexed to it by the Dartmouth College case.

This proposition rests upon two grounds:—

1. Such corporations are invariably of that class denominated in the common law, *civil;* and,

2. Such corporations are invariably mere "instruments of government, created for its purposes."

I. The leading qualities inherent in all civil corporations under the common law, have already been enumerated. In that law, all are public in character, from possession of legislative power; the franchises of all are inviolable by the crown; the State is founder and visitor of all; and the conduct of all is deemed a fit subject of legislation by the State; all are alike capable of holding and managing property for the benefit of their members; all derive their property mainly from rateable contributions by their members; and membership in all confers valuable advantages upon those enjoying that relation, and is protected against encroachment as a valuable privilege.

No English court or lawyer seems ever to have intimated that civil corporations are susceptible of division into classes, in some of which the rights of corporators are more subject to interference by the State than in others; or even more properly matters for regulation by the State than in others. If, in the nature of things, any ground for such a classification could exist, it naturally would be looked for in the fact that some civil corporations are designed to directly advance the pecuniary interests of their members, while others are not. But, if the history of civil corporations under the common law be taken up at its beginning, and traced down to the time of the American Revolution, it will not be found that any distinction between their legal characters, founded upon the idea of pecuniary advantage resulting to their members, had ever been recognized.

Corporations designed to immediately promote the material welfare of their members were among the first, if not the very first, of civil corporations, in England. They were as early, in point of time, as those created for purely municipal purposes. The inhabitants of the several towns, engaged in trade and in skilled labor, were erected into bodies politic, for mutual advantage and protection; and

the entire regulation of the particular branch of trade or of the particular calling within the town and its neighborhood, was placed in the hands of the corporation devoted to it.

Hallam's Works, Europe during the Middle Ages, pp. 364–5.

The corporation of the city of London was nothing more than a confederacy of such corporations, and no one could become a freeman of that city, unless he were also a member of some one of the trade corporations composing it.

Wannel vs. City of London, 1 *Strange*, 675.

These trade corporations controlled, in the interest of their members, every detail of the particular business, within the territorial limits of their jurisdiction.

Their by-laws, as a common thing, forbade all except members of the corporation to ply the particular vocation within the town; limited the number of apprentices which members of the corporation might take, so that competition should not become too great; established the terms on which apprentices might be taken, and the personal qualifications of apprentices; and even regulated the quantity of goods that might be produced within given periods of time.

Robinson vs. Groscourt, 5 *Mod.*, 104.

Rex vs. Harrison, 3 *Burr.*, 1323.

Rex vs. Company of Surgeons of London, 2 *Burr.*, 892.

Rex vs. Tappenden, 3 *East*, 185.

Nevesley vs. Webster, 1 *Kenyon*, 243.

Freemantle vs. Company of Silk Throwsters, 1 *Levinz*, 229.

All these corporations, too, were empowered to and did, acquire, hold, and manage property, for the mutual convenience, profit, and benefit of their corporators.

These corporations must, undoubtedly, be considered the first types of all the various classes of corporations that have been created in England and America, for the purpose, in whole or in part, of the pecuniary advantage of their members; and they cannot be regarded as differing from those of the present day in legal status; although

the legislative powers of the modern ones are, perhaps not so extensive. This difference, however, sounds merely in degree, and not in principle.

Yet, with the existence of such corporations since the time of William II., constantly and in great numbers, it is believed that no utterance of any English court can be found to the effect that corporations stand in the common law upon a legal footing in any way different from that whereon those organized for municipal purposes only stand; or that the rights of members of such corporations are properly less liable to control or modification by the State, than the rights of members of those organized to govern towns.

And the Dartmouth College case, itself, shows that the fact whether or not a corporation confers immediate—or even any—financial benefits upon the persons composing it, does not render its charter any more or any less subject to modification by the State. In that case no provision had been made for the slightest pecuniary return to those who had endowed the college from their private possessions. If, therefore, the question of profits could have been at all material in deciding whether the charter of the college stood subject to modiffcation by the State, that case must have gone the other way.

It has never been claimed that the charters of a numerous class of civil corporations did, in the common law, constitute contracts between the State and the corporators.

But, where can any line of distinction recognized by the common law, be traced between civil corporations? On what ground can the doctrine that, under the common law, the charters of *some* civil corporations constituted contracts with the State, while those of *others* did not, be put? That it cannot be put upon the ground of pecuniary gains to the members, has already been made clear. But the learned counsel for the plaintiff in error, like all those with whom they agree upon the point, say it should be put upon

the ground, that the charters of some corporations must be accepted; that there must be two parties to the creation of such franchises, to wit: the grantor and the acceptor.

It has, however, already been shown, that this ground will not support the proposition; for the same thing was, in the common law, as true of all charters of civil corporations as of any; as true of charters to govern towns, as of those to carry on commercial business; as true of charters admitted not to constitute contracts, as of those claimed to constitute them.

It has further been shown, that, under the common law, no characteristic ever relied on as giving to the charters of some civil corporations the quality of contracts, was absent from those other civil corporations whose charters are universally admitted not to be contracts.

If, therefore, the term contract, as defined by the common law when the constitution was adopted, was applicable at all to the charters of civil corporations, it must, from the nature of things, have been applicable to such charters universally. But, it is admitted that it was not applicable to them universally, and, therefore, it must logically follow that it could not have been applicable to them at all.

Does the Dartmouth College case contain anything in conflict with this conclusion? It has been shown that it does not. It is not a case which is merely silent about civil corporations. It is one where the conclusions reached were expressly and laboriously put upon the basis, that the corporation before the court was not, and could not be considered, a civil corporation.

II. The Dartmouth College case expressly recognized the doctrine that all civil institutions bearing the character of "instruments of government, created for its purposes," are subject to be controlled, remodeled, or swept away, by the State, at its will.

But, what institutions the court considered as falling within the denomination "instruments of government, created for its purposes," the court did not stop to specify

in that case. For it to do so in that case was unnecessary. The purposes of that case were fully met by ascertaining that Dartmouth College was not such an institution. But the court, in two other cases, of hardly less celebrity and consequence than the Dartmouth College case, one of which was decided at the same term with that case, and the other so soon afterward that but a single change had occurred in the judges composing the court, threw out all the light upon what are to be deemed "instruments of government," which the purposes of the case at bar make at all desirable.

McCulloch vs. The State of Maryland, 4 *Wheat.*, 316.

Osborn vs. The Bank of the United States, 9 *do.*, 738.

In these cases, it was determined that a corporation, four-fifths of whose capital was to be provided and owned by private persons; which was to trade in money and securities in like mode as ordinary banking concerns might; and which was intended to earn large profits for division among the individuals composing it; was not an institution private in character; but was an instrument of gov ernment created for its purposes, and, therefore, public and governmental in its legal qualities: a parcel of the machinery of the government of the United States.

In the case last cited, the Chief Justice, in his opinion, said:

> The foundation of the argument in favor of the right to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and profit for its great end and principal object. If these premises were true, the conclusion drawn from them would inevitably follow.
>
> * * * * * * *
>
> But the premises are not true.
>
> *The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but, as a public corporation, created for public and national purposes.*
>
> That the mere business of banking is, in its own nature,

a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company.

It was not created for its own sake, or for private purposes, *pp.* 859, 860.

If it be within the power of judicial decisions so to do, *Dartmouth College vs. Woodward*, *McCulloch vs. The State of Maryland*, *and Osborn vs. The Bank of the United States*, unitedly settled the following principles of constitutional law:

1. The States are supreme over all civil institutions created by them to be instruments for the accomplishment of public purposes.

2. Every civil institution created by the States to administer a public function, or to perform a public duty thereof, or even to facilitate the administration of government by the regularly constituted authorities thereof, is such an instrument.

3. Because a civil institution is a corporation, the members whereof are private persons; the capital whereof is contributed by such members; and which is designed to earn profits upon the capital thus contributed, for division among its members; it is none the less an instrument of government, and none the less a public institution.

That railway corporations are but "instruments of government, created for its purposes," has been, as the defendants in error feel confident, fully demonstrated in preceding portions of this brief. Every essential power held and used by them, as has already been shown, is public and governmental in quality. They are *mere agents*, to whom the States have entrusted certain of their most important functions, to the end that their duties toward their citizens, growing out of the possession of such functions, may be fulfilled.

There is nothing about any of the ordinary railroad corporations of the country, to distinguish them from that one which this court, in two judgments held not to be a private corporation, but to be "a public corporation, created for public and national purposes."

Like that one, their capital is contributed mainly by private persons.

Like that one, their members are private persons.

Like that one, they are expected to earn profits for division among their members.

Like that one, too, they are not created principally to advance the private interests of their corporators. The interests of the corporators are merely incidental and subordinate to the main design. They are not created and endowed with all the high functions which they exercise; they are not subsidized out of the public treasury and the public domain; to the end, merely, or even primarily that the persons composing them may be afforded places wherein to profitably invest their capital. The great and leading idea with which all are created, is the accommodation of the public with some new and improved highway.

The matter of profit to the corporators of such concerns stands in no different relation to the ends for which such corporations are brought into being, than do the fees of public officers to those for which their respective offices are created. Most public offices are endowed with pecuniary emoluments; but it is not for the emoluments that public offices are created.

It would be hard to say why a grant of power to build and maintain a public line of railway should constitute a contract, any more than should a commission to exercise any other power, public and governmental in character. Certainly the Dartmouth College case contains nothing indicating that it could. That case clearly recognizes the existence of a general rule, that concessions of public powers for public benefit, are completely subject to control by the State. And the case does not intimate that a single public power exists, forming an exception to the rule.

Upon both principle and authority, therefore, it seems impossible to escape the conclusion, that a grant of the franchise to build, maintain, and operate a public railroad, is not a contract; but is rather in the nature of a license, as all other delegations of public powers are confessed to be.

And railroad corporations are not to be viewed as private corporations, as some State courts have asserted, without stopping to duly consider the ends for which such concerns are brought into being, and the nature of the powers which they hold and exercise.

Railroad corporations are public corporations, for the same reason that this court held the Bank of the United States to be such a corporation.

In England, railroad corporations have, since railroads began building in that country, been classified by the legal profession as public corporations. Every text book upon that branch of the law, and every digest of reports shows this.

Thus, in the leading modern text-book upon the law of corporations, after stating that corporations are divisible into private and public corporations, the author says:

Private corporations are where a body of traders, or a scientific or other society, aiming only at objects of their own, and not contemplating the conferring any immediate benefit on the public, and not taking upon themselves any public duty or responsibility, are incorporated by charter.

* * * * * * *

Public corporations are such as are established (mostly of late years by act of Parliament) to serve great purposes of State, and holding out advantage and benefit to the public without restriction, or to every one who chooses to comply with their conditions.

Such are the Bank of England, the East India Company, the Railway, Light, Water, Coke, and other companies, &c.

Grant on Corporations, p. 9.

It is quite possible, that the public character of railroad corporations should be regarded as confined to their possession and exercise of public powers; that, in so far as

they hold and wield powers of a public and governmental character, and no farther, they are public corporations; and beyond that they are private corporations.

There is nothing in this case, however, which makes a determination of that question necessary. The powers to build, maintain, and operate such a road, and to take tolls thereon, are indisputably of a high public and governmental character; and no other feature of the plaintiff in error, outside of its tenure of those powers, can be before the court in this case.

Mr. Justice Story, in the Dartmouth College case, expressed the opinion very decidedly, that a grant of a public power, which is not a contract, may be accompanied with incidental stipulations, not being concessions of any such power, which would be contracts. He illustrated this view, by referring to the case of public offices, having annexed to them stipulated salaries, for fixed periods of time. The office itself, being a mere authority to hold and exercise a public power, he considered as having nothing about it that could be deemed a contract; but the stipulation to pay the specified salary, he regarded as a contract, irrevocable by the government, during the term for which the office should be granted.

See report of case, p. 694.

If this distinction be correctly drawn, grants of many immunities and privileges, and of all physical property, to railroad corporations, might be regarded as stipulations binding upon the government, while, at the same time, grants to them of all public powers should still be considered as mere licenses, not amounting to contracts.

Thus, exemption from taxation is not the delegation of any power whatever, either public or private. It is a mere withdrawal by government of the right to exercise, by its public officers, a certain power, to which all persons and property within the jurisdiction of the government wielding it, is primarily subject. Taxation, when applied to officers, and to public corporations, does not diminish nor vary the exercise by them of any public power held by

them; but merely subtracts from the emoluments accruing from the exercise of such powers, after they have come to the possession of the officers or corporation, and thus become private property.

It might well be, therefore, that the grants of the powers to build, maintain, and operate, a public line of railway, and to take tolls thereon, should not amount to contracts, and that an express stipulation that the grantee of such franchises should be free from taxation in respect to his operations under such franchises, should amount to a contract.

So, it would be quite possible that a grant of property, either executed or executory, should be in the nature of a contract, without the grant of the franchises to build, maintain, and operate the road, and to take tolls therefor, amounting to such.

Railroad corporations must hold much property, outside the roads, their equipments and appurtenances, which would bear the character of private property.

Even tolls, although in the nature of taxation, when once actually collected, and reduced to possession, would bear that character. Even the funds and capital provided for the construction of the road, before actual use for that purpose, would bear the character of private property. It would not, therefore, be inconsistent, to maintain that a grant of property of that kind by government, would be a contract, while the grant of public franchises would not.

SECOND.

But, if the grant of the franchises to build, maintain, and operate, a public line of railroad, and to take tolls thereon, be to any extent a contract, how far would it impose upon the grantor the obligation not to regulate, by law, the use of such franchises?

It is manifest, that this proposition, when applied to any given case, would resolve itself into the form of an inquiry,

how far the State had, as to the particular subject matter, contracted to surrender its sovereignty?

The rules for discovering the intention of a State, when it treats with individuals concerning the delegation of public powers, or concerning the withdrawal of its authority to legislate about persons and things within its territorial limits, have already been discussed at length. And the conclusion arrived at has been, that individuals cannot claim public powers to have been conferred upon them, or legislative authority over their persons, their possessions, or their rights, to have been waived, unless the intention of the State to that effect has been exhibited by the use of clear and express terms.

If these rules of interpretation be correct, (and their correctness cannot be doubted,) a grant by a State cannot involve the surrender of legislative power to any greater extent than the grant is express, positive, and clearly defined, in its description of the rights to be conferred. Only such rights and immunities touching the subject matter of the grant, as it is expressly stated in the grant are to be enjoyed by the grantee, could be considered as irrevocably vested in him. Any and all rights and immunities touching such subject matter, not expressly mentioned in the grant, would have to be derived from, and held under, the general laws of the State; and, consequently, would not be derived from, nor held under, any contract with the State.

For purposes of illustration, suppose a State, being owner of a tract of land, should, by a special statute, grant it to A. B. The contract, in such case, would not involve the surrender of legislative power over the land, to any greater extent than to protect A. B. in the enjoyment of such rights and immunities touching the land, as should be enumerated in the grant. If the grant should merely state, that the title to the land should be in the grantee, the legislative power of the State over the land would be precisely what it would be if the title should never have been in the State. The State could regulate the use and

enjoyment of the property, in the hands of the grantee, and of his successors in interest, to like extent as it could regulate the use and enjoyment of other property in the State similarly situated. The contract with the State would be confined to the title to the land, on account of the right to own it being the only right expressly mentioned in the grant.

If, however, it should be expressed in the grant, that the land should always be held subject to the right of the owner to use it for a specified purpose, it might be deemed that the State would stand estopped from afterward forbidding it to be used in the mode, and for the purpose specified. But such estoppel would clearly be confined to the particular use; and all other uses of the property would be under full control of the government, in what it should deem to be the public interest.

If a State grant lands, and afterwards, by law, says that the grantee shall not be permitted to enjoy them in a particular mode, or shall be at liberty to let others use them only on particular terms, the grantee cannot plead in avoidance of the operation of such laws the fact that he has derived his title to the lands through contract with the State, unless such contract has expressly guarantied to him the exemption which he claims.

Suppose, in the New Orleans Slaughter House Cases, some of the property on which it was forbidden by the State to carry on the business of herding and slaughtering animals had originally belonged to the State; could the present owners have claimed the action of the State, in denying to them the right to put their lands to the profitable uses mentioned, to be in violation of the contract through which the State originally parted with the lands? It will not be argued that they could.

When anything, corporeal or incorporeal, is granted by a State to individuals, it is universally understood to be on the condition that the thing granted is to be held and enjoyed subject to the laws of the State, except in so far as

the grant specifies what rights shall be enjoyed in the thing granted. This proposition is no less true of franchises than of physical property. And no well considered case with which the defendants in error have met has gone farther than this. Among the most prominent cases which have laid down the principle as stated, are the following:

Providence Bank vs. Billings, 4 *Pet.* 514.

Beekman vs. Sar. & Sch. R. R. Co., 3 *Paige*, 45.

Frankford & Phil. Pass. Ry. Co., vs. City of Phil., 58 *Pa. St.*, 119.

In *Providence Bank vs. Billings*, the Chief Justice, in delivering the opinion of the court, remarked:

> That the taxing power is of vital importance, that it is essential to the existence of government, are truths it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it, undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear. p. 561.

And again:

> The great object of an incorporating act is to bestow the character and properties of individuality, on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burthens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist. *P.* 562.

Beekman vs. Saratoga & Schenectady R. R. Co. is the leading case in this country upon the question of legislative authority to delegate to railroad constructors the power of eminent domain. It was a bill in equity to restrain the company from appropriating the plaintiff's land for its uses, under authority in its charter so to do. The plaintiff maintained, that the grant of the power of eminent domain was unauthorized and void, because the

company's road would not be a public highway. The charter gave to the company the franchise to levy tolls upon those having their property or persons carried over the road, in express terms; and one of the arguments whereby the plaintiff sought to maintain his position that the road would not be a public highway was, that the company would be at liberty to charge tolls at rates so high as to practically exclude the general public from enjoyment of the facilities to be afforded by the road.

But the learned Chancellor overruled this objection, holding that the charges of such a concern are subject to revision and reduction, from time to time, by the State, unless the authority to do so be renounced by the State by contract.

In *Frankford & Phil. Pass. R'y Co. vs. Philadelphia*, the facts were, that a charter had been granted, authorizing the company to build a street railway, in the city of Philadelphia, and to operate it with cars for the carriage of passengers. Afterwards, acting under a special act of legislature, the city passed an ordinance, or by-law, requiring the operators of street railroads within the city to annually take out a license for each car to be used upon any of the roads, and to pay into the treasury therefor the sum of fifty dollars. Without such license being first obtained, the ordinance prohibited the use of cars upon the roads.

The Frankford & Phil. Company claimed that this ordinance, if enforced against it, would impair the contract arising out of its charter. Its position was, that the charter, having in express terms given it leave to put its cars upon its road, and to run them over it for the conveyance of passengers, that right could not be taken away by any legislative act, either municipal or State. But the court upheld the ordinance, on the ground that the company stood subject to legislation designed to regulate the kind of business in which it was engaged, to like extent as if it had not been incorporated.

emanating from a State, the precise extent to which the State is debarred, if at all, from regulating the use and enjoyment of such franchises, can be ascertained with little difficulty.

Such grants are usually couched in brief and general terms. How the rights granted shall be enjoyed and used, is a matter rarely if ever, specified in the charter itself. It is a matter, therefore, to be defined by other laws; that is to say, by the general laws of the State. But the legal codes of States are constantly shifting. What is law to-day may be swept away to-morrow, and a totally different rule be instituted to fill its place.

It is necessary, therefore, to inquire what code of general law is to determine the extent of special privileges granted in general terms, and the mode of the use and enjoyment of such privileges. Must it be that code, only, which is in existence when the special privilege is granted? Under any theory as to the effect of special grants of franchises, could it be justly considered that, by such grants, the State undertakes to refrain from altering its code of general laws relating to the use and enjoyment of privileges of the class of those granted.

The answer must be in the negative.

The code of laws which is to define the mode and extent of the use of special privileges granted in general terms, must be that one in force at the time of such use, and not merely that one in force when the privileges are granted.

For purposes of illustration, take the case of a chartered banking institution, which is empowered to make loans, and to charge interest for the same. If such a charter be a contract, one of the rights vested in the proprietors of the concern is that to charge interest upon loans. The Legislature cannot take away that right.

But the extent of such right must be defined, and the mode of its enjoyment must be regulated in some way. Interest, like any other compensation for services rendered or facilities afforded, must be at some particular rate; and

how shall such rate be determined? If the charter specify the rate, and the charter be a contract, the rate so specified will be the one which the bank will always be at liberty to take. The charter itself will define the limits of the right it grants, and to look for a definition of it elsewhere will be needless.

But suppose the charter is silent as to rates at which interest upon loans may be charged; how is the right given by the charter to be defined? The answer is obvious. It can only be one thing. The right must be defined by the general laws of the State regulating rates of interest. But lawful rates of interest are subject to frequent changes. The lawful rate when the bank is chartered, may be double what it is a year afterward. If the bank make a loan after rates of interest have been decreased by general law, which legal rule governs; that one in force when the charter was granted, or that one in force when the right vested by the charter to make the loan is exercised? Clearly the latter; the rate of interest lawful when the loan is made.

The charter of the bank, in the case supposed, would not import any contract by the State, that it should not afterwards pass laws operative upon the bank, to diminish rates of interest on loans to be negotiated by it.

It cannot be contended, with any show of plausibility, even, that railway franchises have qualities by reason whereof their grantees are put in any better position than that wherein the grantees of banking franchises stand, in respect to the definition and regulation by general laws, of the franchises when granted in general terms.

If the extent of the rights and powers specially granted to those who undertake railroad enterprises, and the mode of their enjoyment, be not defined in the charter, resort must be had to the general laws of the State for their definition. If a railway charter say that the grantee therein may take tolls upon the road to be built in pursuance of the charter, it will not be contended that such tolls will be

unlimited in amount; that their extent will be undefined; that the right to levy them will be unbounded save by the pleasure of him who holds it.

On the contrary, as in every other similar case, the general laws of the State will be looked to for the definition and limitation of the right. And for that very reason the limitation will shift with the general rules of law which impose it. And there will be no obligation on the part of the State not to change such general rules of law, at such times and in such modes, as it may deem necessary for the welfare and protection of its citizens.

The defendants in error have attempted to show, in a previous part of this brief, that grants of tolls not specifying the rates to be taken would be void. They think the authorities cited establish the proposition as a rule of law.

But, suppose the rule were different. Suppose, even, that companies like the plaintiff in error are incorporated to be, and are, no more than mere common carriers; an occupation which, while public in quality, does not rise to the dignity of a public franchise. Under that hypothesis, a grant of tolls would not assure to the grantee a vested right to anything more than should be specified in the grant. If the rates of tolls should be specified in the charter; or if some standard should be therein expressly mentioned, by which their rates should be measured, it would not be required to travel beyond the charter to discover the limits of the right granted. But, if the charter should not specify in terms any rates, nor any standard for ascertaining them, the general laws of the State would have to be resorted to for that purpose. If no statute should have been passed upon the subject, the rules of the common law would limit the charge to the fair value of the service. But vested rights cannot be in any general rule of law, whether common or statutory. The rule of law limiting the charge to the value of the service may be done away, and a statutory rule be put in its place. The right to charge then would be bounded by the latter rule; by the written rule instead of by the unwritten one. For example, suppose a statute should be passed by the Legis-

lature of a State, enacting that the operators of railroads within such State should be at liberty to charge four cents and no more per mile for carrying passengers. Suppose further, that while such law should remain in force, the same State should grant a charter to build and operate a line of railroad, and to collect fares for passengers transported over it, without specifying at what rates. Would there, in such case, be any doubt that the limitation of the privilege to make charges for carrying passengers would be imposed by the statute, and be fixed by it at four cents per mile? There could not be.

But, in such case, would any implied obligation on the part of the State arise out of the charter not to amend the general statute so as to decrease the rates; say to three cents? Would there be any undertaking, on the part of the State, that the statute should always remain the same? The State could amend the statute, and reduce the rates thereby allowed, at its pleasure, and the operator of the road would be bound thereby.

There can be no reason why the rule of the common law, which in such case would limit the right to collect fares to the value of the service rendered, should be any the less subject to alteration by the State, than would a statutory rule limiting it to a specific rate. The rule of the common law would no more enter into the charter, or form part of it, than the general statute would.

Where a charter authorizes a company of persons to maintain and operate a public line of railroad, and to take tolls thereon, without specifying at what rates, the authority thereby given is merely one to take tolls at such rates as the general laws of the State shall allow when the transportation is afforded. It is not an authority to take tolls forever at such rates as the general laws of the State may happen to allow when the charter is granted.

Charles River Bridge Case, 7 *Pick.*, 344, (447–8.)

For purposes of illustration, suppose a company of persons be incorporated to prosecute within a city the business of common carrier by stage coaches, and they are

empowered to make charges for transportation in their vehicles, but no rates therefor are named. Would it in such case, be contended, that a subsequent ordinance of such city, fixing, as is the practice in all cities of the world, the rates at which common carriers within the city might charge for their services, would not be as binding upon such company as upon individuals prosecuting the same business? Would it be contended that the rule of the common law, fixing the charge at the value of the services, would always be that on which the company would have the right to insist? The case of *Frankford & Phil. Pass. R. R. Co. vs. Philadelphia*, affords a complete and decisive answer to this question.

It must be concluded, therefore, that a grant of the franchise to levy tolls cannot impose upon the State granting it the obligation not to regulate the amount thereof by general law, unless the amount thereof be expressed in the charter, or unless some rule be provided in express terms in the charter, whereby the amount thereof becomes a mere question of fact, and is not left dependent upon any general rule of law outside the charter itself.

The case of *The New Bedford Bridge*, 2 *Gray*, 337, relied on by counsel for the plaintiff in error, in no manner conflicts with this proposition.

In that case, the company's charter expressly stated that the draws of the bridge should be suitable in construction and at least *thirty* feet in width; while the subsequent act, held to be invalid, provided that the draws should be at least *sixty* feet in width, and be constructed in such mode as a commission should determine on.

The conflict between the charter and the statute was, therefore, one of positive terms. A radical difference against the company in the effect of their respective provisions, could be ascertained by mere arithmetical calculation. Under the charter, the company was at liberty to build draws thirty feet in width, and no more. The contract between the State and the company as to the width

of the draws, therefore, was express. It was no less express as to the manner of the construction of the draws. The word "suitable" must have been deemed to apply to the mode of their construction, and not to their width; because their width was specified in feet. What would be suitably constructed draws, for the position, must have been a pure matter of fact, unmixed with any question of law. It could not have been necessary to refer to any rule, either of the common or of the statutory law of Massachusetts, to ascertain what suitable draws for such a bridge would be. There could have been no rule, either of the common or of the statutory law of that State, which would throw the least light upon the subject of what would be a suitable plan for the construction of draws in the bridge.

That was a case, therefore, where the extent of the right to be enjoyed by the company, in regard to the mode of constructing the draws of its bridge, was expressly defined in the charter itself. But, suppose the charter, instead of specifying that the draws should be suitably constructed and thirty feet in width, had stopped with saying that two draws should be constructed. In that case, could it have been claimed that any contract existed between the State and the company as to the dimensions and plan of the draws?

VII.

THE STATUTES RELATIVE TO THE PLAINTIFF IN ERROR — WHETHER THEY CAN BE CONSTRUED TO EMBRACE A CONTRACT NOT TO REGULATE THE AMOUNT OF TOLLS TO BE CHARGED BY IT.

In view of what has already been said, this proposition can be disposed of in few words. There is no escape from the conclusion that it must be answered in the negative.

Even if it should be conceded that the company's charter permits it to levy tolls, the rates of such tolls are nowhere contracted for in the charter. Such rates must, therefore, be such as the general laws of the State shall permit the company to take when the service is performed for which they are charged. The law which is to determine such rates is not that one in force when the charter was originally granted, but that one which shall be in force when the transportation is afforded. If the company's charter embody any contract whatever, upon the subject of tolls, (which the defendants in error deny,) it is not that the company shall always be empowered to demand tolls at such rates as a jury may decide to be reasonable in each particular case, but merely that it shall be empowered to take such tolls as the general laws of the State may from time to time establish.

The learned counsel for the plaintiff in error have found a stumbling-block in the position assumed by the court below, that, granting the company's charter to permit it to take *some* tolls, a contract does not thereby arise unalterably establishing the rates thereof to be the reasonable value of the facilities afforded, to be judicially determined in the particular case.

It may be, in the first place, remarked that the learned counsel have fallen into error in regard to what the court meant to decide, touching the power of the company, under the form of its charter to take any tolls whatever. The intent of the court was not to pass upon that question at all. The court did not profess to decide whether the franchise to levy tolls had become vested in the company to any extent whatever. It did not, as the learned counsel suppose, adjudge that the company's charter gives it authority to charge *some* tolls; but it merely *assumed*, for the purposes of argument, the truth of the company's claim that it does, and, reasoning from this mere hypothesis, decided, as matter of law, that it does not follow that any contract has arisen fixing the amounts of such tolls. And the reasoning and the conclusion of the court upon

this point are unimpeachable. It no more follows that because a railroad charter permits the company to take *some* tolls, the amount thereof is not to be that fixed by the general laws of the State, than it does because a bank charter permits *some* interest to be taken upon loans, the rates thereof are not to be those from time to time established by the general laws of the State relating to interest.

It would be as logical to conclude that a bank, empowered in general terms to take interest upon loans, has a vested right to demand it at the reasonable value of the use of the money, to be determined judicially in the particular case, as to conclude that a railroad company, empowered in general terms to take tolls, has a vested right to demand them at rates to be determined in the same way.

That the plaintiff in error, or any other railroad corporation, should be subject to legislative control in respect to the rates of its tolls or in respect to its dealings generally with the public, is not a proposition at all startling in its nature. On the contrary it is one in accord with the highest degree of public policy and interest; a proposition the truth of which should occasion satisfaction and not regret.

The experience of the world has demonstrated, that to regulate the compensation of all public employments, is absolutely necessary for the protection of the public against imposition, inconvenience, and extortion. And such regulations are rigidly imposed everywhere, and in all countries.

In Europe, where competition between carriers is much greater than in America, and where, on that account the public are better protected than here by the natural laws of business, a system of control over the business of carriers, descending to the minutest detail thereof, has everywhere been deemed necessary, and everywhere been instituted. And this power, while it has benefited and protected the public, has not been found at all oppressive or injurious to the carrier. Nor will it be found so in this country. Mistakes on the part of the law making

power may sometimes happen in the practical use of its authority; but such mistakes, when discovered, it is confidently believed, will be speedily and completely rectified.

The theory that the public would derive protection against extortion and imposition committed by railroad carriers, through the rule insisted upon by the plaintiff in error in this case, is as complete and utter a fallacy as could be devised. Such extortions, in any individual case, are small and petty in amount. It is the number and frequency of them that renders them great public evils. No individual could afford to enter into a legal contest with a powerful railroad corporation, for a few dollars, with the burden upon himself to make out an overcharge, however plain the fact of extortion might be to him. Unless the State interposes its authority, and determines by law what is a proper charge, and what is an improper one, the public will have no rights against railroad companies, worth preservation or vindication.

A vested right in a railroad company to charge such rates of tolls as a court and jury shall declare to be proper in each individual case, is practically a vested right in the company to charge such tolls as it shall see fit; for nobody could afford to litigate the question with it.

Nor, does the fixing by law of the rates of tolls to be charged by railroad operators amount to an invasion, or even to a regulation of the uses, of private property.

Such roads, and their equipments and appurtenances, are commonly spoken of as the property of those out of whose means they are provided. But the term property, in its ordinary sense, is inaccurately applied to such objects. It usually carries with it the idea of complete dominion over the thing in which the right exists. But, in the case of public ways, no such dominion exists. They must, in all cases, and by whatever agency provided, be held exclusively and perpetually for the single use for which they have been constructed, and cannot, without express consent of the State, be diverted to any other use.

No common law rights of property in such objects exist in any private person or company of private persons; and the only revenues that can be derived from them to their builders and operators, must come from such charges upon the public for the use of the way, as the charter under which it is maintained grants, or the general laws of the State permit.

Perrine vs. Ches. & Del. Canal Co., 9 *How*, 172.

When a railroad is built and put into operation, it at once becomes devoted to public uses, and an obligation attaches to its builder and operator to permit the public to use it on such terms as the charter and the general laws of the State shall prescribe.

Beekman vs. Sch. & Sar. R. R. Co., 3 *Paige*, 45.

Bloodgood vs. M. & H. Riv. R. R. Co., 18 *Wend.*, 2.

Lumford vs. Stears, 4 *Cush.*, 41.

A law, therefore, permitting the public to pass over such a road on enumerated conditions, cannot violate any right of property vested in the company; and those constitutional limitations designed to protect private property against unwarranted invasions, would not apply to such a law. Such a law might be void as a violation of a legislative contract, where such a contract existed in reference to the conditions on which the public should enjoy the right of passage over the road; but if it should violate no contract, it certainly could neither take the property for public use without just compensation; nor deprive the owner thereof of it without due process of law.

If the rates of compensation established by legislative enactment should, in any case, be so small as to afford revenues insufficient to maintain and operate the road, (a case hardly possible to actually arise,) it might, indeed, afford a reason why the company would be justified in surrendering its franchises, or even in ceasing altogether to operate the road. But, if the regulating act should violate no contract in respect to rates of tolls, so long as the company should continue to operate the road, it would be bound to do so under the conditions by the act imposed.

VIII.

In conclusion, the defendants in error will briefly consider certain objections to the validity of the statute under discussion, put forward by the plaintiff in error in this court, but not raised in the court below.

1. That the road has been subsidized by the general government, on condition that it should be and remain a public highway for the passage of the troops, property, and mails of the United States, and that the action of the State in regulating the company's rates of charges against the general public for transportation might destroy the ability of the company to perform its duties then owing to the United States.

2. That the statute is void as to property transported over the road from the State of Minnesota to other States, and as to property transported from other States into the State of Minnesota, because it is an unwarranted regulation of inter-state commerce.

I. The first of these objections is answered by the fact that the road is a highway of the State of Minnesota; and it is only in respect to its uses as a highway of the State, that the regulation is imposed. The State has incurred no obligation to the Federal Government, that the company should be able to transport the troops, property, and mails of the United States, free of charge, or at all. Whether it should be capable of fulfilling its duties in this behalf, and still perform such duties as should lawfully be imposed by the State, was a risk which the general government itself assumed, and still holds. The State has never bargained with the United States that its sovereignty over this company's road should be surrendered, totally or partially.

II. The law in question is not a regulation of inter-state commerce, within the meaning of that provision of the Federal Constitution empowering Congress to regulate commerce between the States, with foreign nations, and with the Indian tribes.

That clause of the Constitution does not give to the United States any jurisdiction over the institutions of the States, created for the convenience or benefit of their citizens. It does not, therefore, give Congress any jurisdiction over highways provided by States. Such jurisdiction remains in the States.

Gibbons vs. Ogden, 9 *Wheaton*, 1.
Conway vs. Taylor's Executors, 1 *Black*, 603.

W. P. CLOUGH,
Counsel for Deft's in Error.

58 Penn St
4 P Smith Blvd
62 Penn St 216
52 " "

4-180

SUPREME COURT

OF THE

UNITED STATES.

THE WINONA AND ST. PETER RAILROAD CO., *Plaintiff in Error,*

vs.

JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. CROUCH,

In error to the Suprememe Court of of the State of Minnesota.

PETITION FOR RE-HEARING.

B. C. COOK,

For Plaintiffs in error.

CHICAGO:
H. WILLSON & CO., Steam Printers, 170 Clark Street.
1877.

D

SUPREME COURT

OF THE

UNITED STATES.

THE WINONA AND ST. PETER RAILROAD CO., *Plaintiff in Error,* *vs.* JOHN D. BLAKE, ALFRED D. LEET, AND STEPHEN V. CROUCH,	*In error to the Suprememe Court of of the State of Minnesota.*

PETITION FOR RE-HEARING.

The plaintiff in error in the above entitled causes respectfully request that a rehearing of the cause may be awarded, and a re-argument directed, for the following reasons:

The opinion of the Court in this cause is based upon the case of Munn & Scott vs. The People, decided at the present term of this court, and in which a petition for a re-hearing has already been filed. The reasons presented in the petition in the case referred to are, without repetition, therefore submitted in support of this petition.

Petitioners respectfully represent that the points decided in the case of Munn & Scott vs. The People, were not made or discussed by the counsel for defendants in error in the above entitled cause, and therefore this cause was decided upon points not discussed by the counsel of your petitioners.

The facts in this case are admitted upon the record, being averred in the bill and admitted by the demurrer.

These are, substantially:

1. That the Railway Company was the owner of a railway in the State of ~~Wisconsin~~ Minnesota, which has been constructed and equipped at an expense of many millions of dollars. That the same had been constructed in pursuance of the law of the State.

That by affirmative statute of the State the company had been authorized to borrow money upon the security of its road and equipment, and that it had done so to a very large amount,

2d. That the ~~Potter~~ law required the company to transport persons and property as a common carrier, at a rate of compensation which entailed a positive loss upon the company in the operation of the road, which made the property of the company in the State of ~~Wisconsin~~ Minnesota of no value, and destroyed the security of its bondholders.

Upon this record there can be no dispute as to the facts. The opinion of the Court holds that the legislature has the power to control the use of this property, not because the company is a corporation of that State, but because its property is used in such a way as to affect the public interest. In other words, its property is used by the public to a greater extent than private property is ordinarily so used. It seems to me necessarily to follow, either that an owner of property may be wholly deprived of all beneficial use of such property forever

without being deprived of the property itself, which is a doctrine repeatedly denied by this Court in the plainest terms.

Pumpelly vs. Green Bay Co.; 13 Wall, 166, and cases there cited.

State Bank of Ohio vs. Koop; 16th Howard, 385.

Fletcher vs. Peck; 6 Cronck, 135.

Or, that the property which is "affected with a public interest" is not within the protection of the fourteenth amendment to the Constitution of the United States.

The term "affected by the public interest," as used by Lord Chief Justice Hale, I submit had, in his day and age, and as affected by feudal law, a meaning very different from property wholly purchased and paid for by private parties, and used by the public to a greater extent than ordinary private property.

The charges of millers might well be regulated by law when the law compelled every person within a given district to have his grain ground at one mill. The rates of ferriage might well be regulated by law where the ferry was over a public stream, in which the ferryman had no right of ownership, and in case when the ferryman had an exclusive right conferred by law for a given distance upon the stream. Hackmen who occupied as a stand a portion of the public ground of a city, might be given that privilege upon condition that they should not be guilty of extortion.

Warehousemen who had a monopoly created by law, of storing wines from importers before duties were paid, might be limited in their charges for such service. The weight of bread might be regulated as a police regulation to avoid fraud in size and weight of loaves. Yet it is submitted that none of these cases are like the one at bar, where the question as it stands upon the record is: can the Legislature deprive the Railway Company of all beneficial use of its property for all

time—but it is not proposed in this petition to do more than ask the attention of the Court to the argument in the petition in the case of Munn & Scott upon this question.

If the Legislature has the power to determine absolutely what are maximum reasonable rates of compensation and the question is a Legislative and not a judicial one, it would seem to follow necessarily that it had the same power to determine under what circumstances any property is "affected by a public interest," and so the power of the Legislature over the use of all property be absolute and unlimited and the protection sought to be given to private property by the amendment above cited be wholly without effect. If the Legislature may fix the value of the services of the man who handles the grain in the warehouse, may it not also fix the value of the labor of the man who sows or reaps, or the coolies in California, or the negro in Carolina.

It is said that "when one devotes his property to a use in "which the public has an interest he in effect grants to the "public an interest in that use, and must submit to be con- "trolled by the public for the common good to the extent of "the interest he has thus created. He may withdraw his "grant by discontinuing the use, but so long as he maintains "the use, he must submit the contract."

The principle thus announced in this case, means that this Company has granted to the public the uncontrolled use of its property, with the right to the public to deprive the owner of any beneficial use of it whatever.

I respectfully submit that the grant has no greater extent than this, the right to use the property for a reasonable compensation to be paid to the owner therefor. If the parties cannot agree as to what such reasonable compensation would be, it is to be determined by the courts like any other disputed

questions, and the right of a railway Company to withdraw its grant to the public by ceasing to operate its road when required to operate it at its own expense and without compensation and thereby abandon all its property, which has no value when disconnected with the road, and which cannot be removed, is not after all a right of much value or importance.

This Court has decided in the case of VonHoffman vs. the city of Quincy, 4th Wall, 548: That in case where the Statutes of Illinois authorized the city of Quincy to borrow money and to levy taxes to pay the interest and the principal of the loan that a statute which took away the power of levying a sufficient tax for that purpose was invalid, because it impaired the contract between the city and its bondholders.

In this case it is admitted upon the record that the Company borrowed money and issued its bonds in manner provided by law, and second, that the ~~Potter~~ Law prevents the Company from paying its bonds or at least greatly ~~beyond~~ the payment. The Court in the case cited, says: "One of the tests that "a contract has been impaired, is that its value has by legisla- "tion been diminished. It is not by the Constitution to be "impaired at all. This is not a question of degree or cause, "but of encroaching in any respect upon its obligation, dispen- "sing with any part of its form."

I ask leave respectfully to refer the Court to an extract of the opinion of the late Judge Curtis, prepared in this case bearing upon the questions decided in the Munn & Scott case and which I have filed herewith.

B. C. COOK.
For Plaintiffs in error.

Copy of Opinion of Judge Curtis

My opinion has been requested by the Chicago and North-Western Railway Company concerning the constitutional validity of an act passed by the Legislature of the State of Wisconsin, approved by the Governor on the 11th of March, 1874.

So far as that act undertakes to regulate the rates of freight and fare receivable by said railroad, and to compel the corporations, under heavy penalties, to be inflicted on itself, its servants and agents, to transact its business at the rates of compensation in that act described and enumerated, certain material facts are stated as proper to be taken into consideration.

The first is, that this Railway corporation, which was formed by the consolidation of different railways lying in Wisconsin and Illinois, had, both by virtue of the original charters of these portions of its road, as well as by the act which consolidated them into the present Chicago and North-Western Railway Company, the right to regulate its charges for the business it might transact, through its Directors, subject always to the settled requirements of the Common Law, that, being common carriers of persons and property, those charges must be in themselves proportional and reasonable.

The next material fact stated is that if the corporation transacts its business for the rates of compensation provided in the law in question, its entire receipts will be exhausted by its expenditures, leaving nothing to be divided among its stockholders, or appropriated to the payment of the interest and principal of its outstanding bonds.

The third material fact to be considered is that the sum of forty-five millions of dollars of bonds, duly issued by the corporation under authority of law, the proceeds and avails of which were actually received by the corporation, and expended in building and equipping the road, are now outstanding in the hands of *bona fide* holders, in the United States and foreign countries.

Upon these facts the general question arises: whether this legislation has constitutional validity, so as to be operative and binding upon this railroad corporation, subjecting it and its officers and servants, under the heavy penalties provided in the act, to the necessity of carrying on its business without any profit and even at a probable loss.

The 11th article of the Constitution of Wisconsin contains this provision:

"All general laws or special acts enacted under the provis-
"ions of this section may be altered or repealed by the legis-
"lature at any time after their passage."

If the act now in question can be deemed to have validity, it must derive it from this provision of the Constitution.

This provision is substantially the same as is found in some other constitutions and in general laws of other States, as well as in particular charters; and it has often come under my judicial examination.

It seems to have been generally admitted, by all who have had occasion to consider the question, that this is not an un-

limited power. This has been declared by the highest authority.

Commonwealth vs. Essex Co.,13th of Gray, 253.

Miller vs. Railroad Co., 21st of Barbour, 517.

Miller vs. the State, 15th of Wallace, 498.

The true inquiry here is, what are the limits in this particular case, beyond which the legislature can not pass by virtue of this 11th article of the Constitution?

First: One of these limits may be found in the nature of the act attempting to alter or amend the charter. Charters are to be amended or altered by the exercise of legislative power, and if the act in question, when rightfully viewed, is not an exercise of legislative power, but passes beyond the field of legislation, then it cannot be deemed to be authorized by this article of the Constitution.

And my opinion is that it is not within the field of legislation, under any American Constitution, to fix and prescribe for the future, what prices shall be demanded either for commodities or for personal service, or for a union of both. I do not believe it is within the power of any legislature in the United States to compel owners of property or persons, natural or political, to part with their property or render their personal services at their own expense and risk to the public for prices fixed by the legislature.

If the legislature in this instance can be deemed to have possessed that authority, it must be because this particular case is an exception to the general rule. I suppose the ground up-

on which such an exception would be attempted, is, that railroads have often and correctly been said to be public highways. They are so in some sense. They are usually authorized by the State to be constructed, and the power of eminent domain is entrusted to the corporation to enable it to locate and construct the road; but when constructed it is out of the means of a private corporation, which is the owner of the road in the same sense that a private corporation is the owner of a bank. Moreover, this fact that a railroad is in some sense a public highway, stops far short of what is necessary in order to lay the foundation for such legislation as is found in this act; because this legislation undertakes to prescribe the prices which shall be paid, not for tolls for passing over the road, but for the service rendered by the corporation as common carriers in transporting, at its own expense and risk, persons and property from point to point on the road, as well as for receiving and delivering the persons and the property. Now, here again there is an element of publicity in the character of the corporation and of its business. Being common carriers of persons and property, the law requires them to transact business for all applicants, at reasonable times, and at reasonable rates of compensation. But a railway corporation, when carrying on the business of common carriers, at its own expense and risk and for its own profit, can not be distinguished from any other common carriers. Its duties, its liabilities and its rights are the same, whether they transact the business over a road which they own, or which they hire, or which nature has made for them in the shape of a navigable river, or which the public has built at its expense and thrown open for common use, and unless it can be successfully maintained that the legislature

may, by what is in truth a legislative decree, establish for the future prices for personal service and expenditures and risks incurred in rendering it. I am unable to see how this law can be brought within the field of legislation.

Secondly: The 13th article of the Bill of Rights of the Constitution of Wisconsin is as follows:

"The property of no person shall be taken for public use "without just compensation therefor."

It is settled law, both in Wisconsin and elsewhere, that this article requires the law which takes the property to provide for making the compensation.

It is settled also by the highest authority that to amount to a taking within the meaning of this article of the Constitution, it is not necessary that the owner of the property should be deprived of its possession. If he is allowed to remain in possession, but forced under heavy penalties so to use his property as effectually to destroy or greatly impair its value, the case comes within this article of the Bill of Rights.

Pumpelly vs. Green Bay Co., 13th Wallace, 66.

Upon the facts which have already been stated, it is apparent that this railway corporation has, under this law, but one of two alternatives; the first being to continue to carry on its business for the prescribed rates of compensation, certainly without any profit and probably at a considerable loss; or to abandon the use of its property and close up its road. I cannot entertain any reasonable doubt that such a law, accompanied and to be enforced by severe penalties, which render

one or the other of these alternatives absolutely necessary, is an infraction of the article in the Bill of Rights.

A law which, under heavy penalties, prohibits a person, whether natural or political, from using his property so as to derive any advantage whatever from it, and leaves him subject only to loss from its use, does as effectually take his property as if it had under the like penalties prohibited its owner from interfering with it.

Thirdly: But there is another objection to this law, which, to my mind, is of itself decisive. Under the power to alter, amend or repeal a charter, a legislature may charge, or, in some instances, perhaps, destroy contracts into which *the State* has entered by the granting of charters. But this must be limited to the modification or destruction *of the contracts of the State.* It has never been extended, and consistently with the Constitution of the United States, it cannot be extended to contracts made by the corporations under authority of law with *bona fide* creditors, who have lent their money to construct and equip the railroad and taken security by mortgage thereon. Any law of a State which takes away property relied on by creditors when they loaned their money, or the security on which they gave credit, or which seriously impairs the remedy which such creditors have had, impairs the obligation of their contracts. This has been repeatedly decided by the Supreme Court of the United States, in a series of cases.

Brownson vs. Kinzie, 1st of Howard, 311.

McCracken vs. Hayward, 2d of Howard, 608.

Curran vs. Arkansas, 15th of Howard, 305.

Hawthorne vs. Calef, 2d of Wallace, 10.

Tomlinson vs. Jessup, 15th of Wallace, 454.

This railroad mortgaged all its property under an authority conferred upon it by law so to do, to secure the payment of its bonds, and a law of the State, enforced by sufficient penalties, which compels the railroad corporation so to employ the property thus mortgaged to the bondholders that it becomes useless, not merely to the corporation itself, but also to the bondholders, deprives them of security which lawfully belongs to them, and impairs the obligations of their contracts. When they took these mortgages they had a right to presume, and unquestionably did presume, that the property mortgaged would be employed by the railway corporation for reasonable rates of compensation in transacting their business.

This just and reasonable expectation cannot, in my opinion, be disappointed, and the rights acquired by the mortgagees disregarded, through an act of the legislature, in effect commanding the road to transact its business on such terms that the bondholders cannot possibly receive any part either of the interest or principal of their bonds.

And I wish to say in this connection, though it also has relations to some other positions in this opinion, that this power to prescribe prices of commodities and service for the future, does not exist at all, or it is unlimited; and if the fact above stated, that business transacted by the railway corporation, at the rates prescribed by this act, would certainly no more than

pay the expenses of transacting the business, should be controverted or denied, such denial would not be sufficient to support this law; because, as already stated, if the rates prescribed would leave some profit to the railroad, it is in the power of the legislature still further to reduce those rates, and compel the railway corporation to conduct its business at a loss; and indeed, this very law, by its 13th section, undertakes to authorize the Railroad Commissioners who are to be appointed under it, to use their discretion to reduce the rates mentioned in the act, and makes that act of discretion final and conclusive.

And it also delegates to the Commissioners, power to classify all articles of freight other than those classified by the act itself, and thereby to fix the rates which shall be paid for their transportation.

My conclusion is, that this law impairs the obligations of the contracts of the bondholders, and is therefore invalid under the Constitution of the United States.

Though I have taken full time for the investigation of these questions, the necessity for speedy decision as to their action by the managers of the railway corporation has prevented me from going more elaborately into the argument on either of the points taken, or from making more numerous citations of authorities.

(Signed,) B. R. CURTIS.

April 10th, 1874.